(9)

No. 96-653-CFX Title: Kenneth Lee Baker and Steven Robert Baker, by His Next Friend, Melissa Thomas, Petitioners
v.
General Motors Corporation

Status: GRANTED

Docketed:
October 25, 1996 Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Tribe,Laurence H.

Counsel for respondent: Starr,Kenneth W.

Ptn mailed oct. 22; recd Oct. 23, 1996 NOTE: Reh. den. corr above-see copy of order

Entry	Date	Note	Proceedings and Orders
1	Oct 22 1996	G	Petition for writ of certiorari filed. (Response due December 23, 1996)
3	Nov 18 1996		Order extending time to file response to petition until December 23, 1996.
4	Dec 23 1996		Brief of respondent General Motors Corporation in opposition filed.
5	Jan 2 1997		Reply brief of petitioners Kenneth Lee Baker, et al. filed.
6	Jan 8 1997		DISTRIBUTED. February 14, 1997 (Page 1)
7	Feb 11 1997		Record requested -- CJ.
8	Feb 25 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Eighth Circuit.
9	Mar 3 1997		Record filed.
		*	Original record proceedings United States District Court for the Western District of Missouri (BOX).
10	Mar 5 1997		REDISTRIBUTED. March 21, 1997 (Page 1)
11	Mar 24 1997		Petition GRANTED. SET FOR ARGUMENT October 15, 1997. **********
13	Mar 27 1997		Order extending time to file brief of petitioner on the merits until May 23, 1997.
14	May 23 1997		Joint appendix filed.
15	May 23 1997		Brief of petitioners Kenneth Lee Baker, et al. filed.
16	May 23 1997		Brief amici curiae of Missouri, et al. filed.
17	May 23 1997		Brief amicus curiae of Association of Trial Lawyers of America filed.
18	May 23 1997		Brief amicus curiae of Center for Auto Safety filed.
20	Jun 2 1997		Order extending time to file brief of respondent on the merits until July 21, 1997.
21	Jul 21 1997		Brief of respondent General Motors Corporation filed.
22	Jul 21 1997		Brief amicus curiae of Product Liability Advisory Council, Inc. filed.
23	Jul 21 1997		Brief amici curiae of Ohio, et al. filed.
24	Jul 21 1997		Brief amici curiae of National Association of Manufacturers, et al. filed.
25	Aug 15 1997		CIRCULATED.
26	Aug 18 1997	X	Reply brief of petitioners Kenneth Baker, et al. filed.

(1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As a result of a state court proceeding, General Motors (the defendant below) obtained a consent decree enjoining one Elwell from testifying against GM in products liability cases. In a federal court suit brought by petitioners against GM, the court below held that the Full Faith and Credit obligation precluded petitioners from obtaining Elwell's testimony.

The question presented is whether the court below erred in holding that petitioners, who were not parties to the state proceeding or in privity with any party, could be precluded from obtaining the witness's testimony on the basis of an obligation to give Full Faith and Credit to state court judgments.

PARTIES TO THE PROCEEDING

The petitioners in this case are Kenneth Lee Baker and Steven Robert Baker, by his next friend, Melissa Thomas.

The respondent is General Motors Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Kenneth Lee Baker and Steven Robert Baker, by his next friend, Melissa Thomas, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the Court of Appeals denying rehearing (App. 1a)[1] is reported at 1996 U.S. App. LEXIS 18387. The decision of the Court of Appeals on the merits (App. 2a-16a) is reported at 86 F.3d 811. The decision of the District Court addressing the Full Faith and Credit issue (App. 17a-39a) is unreported.

JURISDICTION

On July 26, 1996, the Court of Appeals denied the suggestion for rehearing en banc and the petition for rehearing by the panel. *See* Eighth Cir. Rule 35A(4). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Full Faith and Credit Clause provides that:

> Full Faith and Credit shall be given in every State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings may be proved, and the Effect thereof.

U.S. Const., Art. IV, § 1. The Full Faith and Credit statute

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[1] References to the Appendix to the Petition for Writ of Certiorari are styled "App. _a." References to the trial transcript are styled "Tr. _."

provides in relevant part that:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

STATEMENT OF THE CASE

This Full Faith and Credit case began as a products liability action by two children whose mother, 29-year-old Beverly Garner, burned to death in an allegedly defective vehicle manufactured by respondent General Motors Corporation (GM). After a jury trial, the U.S. District Court for the Western District of Missouri entered judgment for the children in the amount of $11.3 million. However, the Court of Appeals for the Eighth Circuit ordered a new trial, in part because it held that the Full Faith and Credit obligation prohibited a federal court in Missouri from admitting the testimony of a witness who was subject to a Michigan state-court decree enjoining him from testifying. The Court of Appeals' decision will govern proceedings on remand. The decision rests on an erroneous view of the federal Full Faith and Credit statute, 28 U.S.C. § 1738, conflicts with the decisions of this Court and other courts, and raises an important question of law warranting this Court's plenary review.

1. Background. On Feb. 23, 1990, Ms. Garner was a front-seat passenger in a 1985 Chevrolet S-10 Blazer when it was involved in an auto accident and caught fire. Although rescuers used three fire extinguishers underneath the hood of the Blazer, the flames kept reappearing. Tr. 558-59. Witnesses heard Ms. Garner screaming repeatedly, "It's hot in here. Please get me

out!," Tr. 441-42; "Help me!," Tr. 491, 504-05, 509; and "I don't want to die this way. Please, somebody, help me out!" Tr. 472.

Ms. Garner's children, petitioners here, alleged that the Blazer was defective in that its electric fuel pump continued to pump gasoline to the engine after impact. Specifically, petitioners alleged that the fuel pump relay, designed to shut off the fuel pump when the oil pressure went to zero, was defective because it was placed in a location that made it vulnerable to collisions. In the 1985 Blazer, the fuel pump relay was attached to the firewall, directly behind the engine block, in the "crush zone." Addendum to Appellees' Br. in Ct. App. 1 (July 20, 1995). (In the 1986 Blazer model, the location of the fuel pump relay was changed to the fender well, outside the "crush zone." Appellees' Addendum in Ct. App. 2.) Petitioners alleged that the fuel pump relay on the Blazer was damaged in the collision and allowed the fuel pump to continue pumping gasoline into the fire that killed Ms. Garner. In addition, petitioners separately alleged that the 1985 Blazer should have been equipped with an "inertia switch" to shut off the fuel pump, as GM had proposed in a 1973 patent application.

2. Initial Proceedings in the District Court. Petitioners, who are residents of the State of Missouri, filed a wrongful death products liability action in Missouri Circuit Court on Sept. 27, 1991. GM, which is a Delaware corporation with its principal place of business in Michigan, removed the case pursuant to 28 U.S.C. § 1441 on Nov. 11, 1991 to the United States District Court for the Western District of Missouri. The district court had jurisdiction under 28 U.S.C. § 1332.

After repeated violations by GM of its discovery obligations under Fed. R. Civ. P. 26, the district court found that "General Motors' discovery practices as a whole [have been] conducted with a complete disregard for both the letter and the spirit of the federal Rules of Civil Procedure." *Baker v. General Motors Corp.*, 159 F.R.D. 519, 520 (W.D. Mo. 1994). Accordingly, "[a]fter full hearings and considerable briefing," *id.*, the district

court imposed sanctions against GM. The court ordered that it "shall be established for the purposes of this action" that

> The 1985 Chevrolet S-10 Blazer at issue in this case was defective in that General Motors placed an electric fuel pump in the fuel tank without an adequate mechanism to shut off the pump in the event of a malfunction or collision and that General Motors has been aware of this defect and hazard for many years. The fuel pump in the 1985 Chevrolet S-10 Blazer in this case continued to operate after the engine stopped upon impact.

159 F.R.D. at 528. The district court incorporated this language in its jury instruction. The case proceeded to trial on the sole issue of whether the defect in the 1985 Chevy Blazer "directly caused or directly contributed to cause" the death of Beverly Garner. Tr. 1725.

3. The Elwell Testimony. At trial, the district court permitted petitioners to introduce the testimony of Ronald Elwell, who was a GM employee for nearly 30 years beginning in 1959. App. 18a. For roughly the first 10 years of his employment with GM, Elwell's primary duties involved the development of door latches and latching mechanisms. Tr. 379. In 1969, Elwell assumed responsibility for a Reliability Program that coordinated quality inspection for products shipped to GM plants. *Id.*

In 1971, Elwell was assigned to the Engineering Analysis Group, which was responsible for providing engineering services to GM's different divisions. Elwell concentrated in the area of fuel systems and fuel-fed fires. App. 18a. As a member of the engineering group, Elwell assessed the performance of GM vehicles in order to advise engineers who were responsible for developing and designing future vehicles. *Id.* He suggested changes in GM fuel line designs. *Id.* He conducted research and studied accidents in the field involving fires. Elwell also

reviewed GM literature on vehicle performance prior to its publication, analyzed relevant legislation that had an impact on the vehicles on which he was working, and advised the advertising department on how GM products should be advertised. *Id.*

In addition, Elwell worked with both GM legal staff and outside counsel in preparing defenses to product liability suits. He testified as an expert witness, consulted with engineers on liability issues, prepared demonstrative evidence, participated in litigation strategy planning, and helped to answer discovery requests. App. 18a. In addition, Elwell was repeatedly designated as the GM employee most knowledgeable about fuel systems, pursuant to Fed. R. Civ. P. 30(b)(6). App. 18a. None of this litigation-related work, however, was specifically done in connection with the instant case. *Id.*

Elwell's relationship with GM ultimately deteriorated. Elwell contended that GM had withheld vital information from him, making his prior trial testimony on GM's behalf untruthful. GM contended that Elwell had had disagreements with his supervisors and was disgruntled over his retirement and severance package.

In 1991, Elwell retained his own attorney and testified against GM in a pending products liability case. *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga.).[2] Elwell also filed suit against GM in the Circuit Court of Wayne County, Michigan, alleging wrongful discharge and other tort and contract claims. GM filed a counterclaim against Elwell alleging

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[2] As the district court noted, Elwell's testimony in the *Moseley* case illustrates that "it is possible for Elwell to testify without impermissibly divulging privileged information even as defined by G.M." App. 33a. Although GM's counsel stated on the record in the *Moseley* case that she would object to any questions which invaded GM's attorney-client or work-product privileges, Elwell testified for two days and 370 pages before GM's counsel made a single attorney-client or work-product objection. GM made only three attorney-client objections in the approximately 580 pages of testimony taken during that deposition.

breach of fiduciary duty for his disclosure of privileged and confidential information and his misappropriation of documents. GM sought a preliminary injunction and, after a brief hearing, the court enjoined Elwell from:

> consulting or discussing with or disclosing to any person any of General Motors Corporation's *trade secrets, confidential information or matters of attorney-client work product* relating in any manner to the subject matter of any products liability litigation whether already filed or filed in the future which Ronald Elwell received, had knowledge of, or was entrusted with during his employment with General Motors Corporation.

App. 19a-20a (emphasis added).

Subsequently, GM and Elwell entered into a settlement under which Elwell received an undisclosed sum of money. As part of the settlement, an "agreed" or "stipulated" permanent injunction was entered in the Wayne County Circuit Court without a hearing. The stipulated injunction was considerably broader than the preliminary injunction and prohibited Elwell from:

> (1) consulting or discussing with or disclosing to any counsel or other attorney or person any of General Motors Corporation's trade secrets, confidential information or matters of attorney-client privilege or attorney-client work product relating in any manner to the subject matter of any litigation, whether already filed or filed in the future, which Ronald E. Elwell received or had knowledge of during his employment General Motors Corporation; and
>
> (2) testifying, without the prior written consent of General Motors Corporation, either upon deposition or at trial as an expert witness, or a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed or to be filed in the future, involving General Motors Corporation as an owner, seller,

> manufacturer and/or designer of the product(s) in issue. Provided, however, paragraph (2) of the Order shall not operate to interfere with the jurisdiction of the Court in the Georgia case referred to in the Stipulation.

App. 20a-21a. The settlement agreement also provided that if Elwell were ordered to testify by a court or other tribunal, he could do so without violating the settlement agreement. App. 5a.

In the case at bar, GM sought to exclude Elwell's testimony on the ground that the Michigan injunction was entitled to Full Faith and Credit in the federal court in Missouri. After *in camera* review of the Michigan injunction and the settlement agreement, the district court issued an order dated June 18, 1993, allowing the plaintiffs to depose Elwell and to call him as a witness at trial.

The district court explained that Elwell's testimony would be highly relevant:

> The parties agree that Elwell is an expert on G.M. fuel systems, including the design history, fuel system safety, design decision-making and subsequent alternative designs. These are the areas into which plaintiffs wish to inquire.

App. 22a. Further, the district court explained that petitioners had committed not to seek any information that might be subject to the attorney-client privilege or attorney work product privilege, or that otherwise might be confidential. *Id.* The district court held that the Michigan injunction impermissibly attempted to resolve the rights of nonparties:

> Unlike a traditional injunction situation, this injunction established not only the rights of the parties before the Michigan Court where the case in which it was entered was pending (i.e. Elwell, G.M. and engineer Bill Chicowski), but, if defendant were to prevail here, forever

> defined the rights of innocent third parties who have a keen interest in the information which Elwell holds.

Id. at 28a. The court added that "the overbroad injunction has prevented the disclosure of not only privileged information, but much discoverable information as well." *Id.* at 27a-28a. "To prevent the disclosure of this information would be against the public policy of the State of Missouri." *Id.* at 25a. The court observed that "Elwell's cooperation with the injunction was bought for an undisclosed sum of money as one of the terms of the settlement of his claims against G.M." *Id.* at 26a. "The public interest would be severely compromised if injunctions of this sort were entered as a matter of course." *Id.* The district court elaborated:

> Under the injunction, G.M. has not only prevented Elwell from speaking on his own behalf, but no one else may find out what he knows, effectively blockading a litigant's search for the truth and for redress. While G.M. is free to pay Elwell for his voluntary silence, this Court holds that G.M. may not pay Elwell to keep others from finding out what he knows.

Id. at 26a-27a.

Elwell's trial testimony concerned his research on fuel-fed engine fires. Elwell testified in support of petitioners' claim that the alleged defect in the fuel pump system contributed to the post-collision fire. Tr. 384-89, 391-97. He also testified as to the existence and contents of a memorandum known as the "Ivey" document. App. 6a. The Ivey document is a value analysis prepared by Edward Ivey, an Advance Design employee, and allegedly circulated among selected top GM and Oldsmobile officials. The Oldsmobile officials, according to Elwell's testimony, were at that time responsible for the overall fuel system design of GM vehicles. *Id.* The Ivey document analyzed the potential expense of the loss of human life per vehicle due to

fuel-fed engine fires. According to Elwell, the analysis implied that the cost to society of deaths and injuries from such fires was only about $2.40 per vehicle. *Id.*

Following trial, the jury awarded Ms. Garner's children $11.3 million in damages.

4. The Court of Appeals' Decision. On appeal, General Motors argued that the district court "violated the Full Faith and Credit Clause by permitting Ronald Elwell to testify in disregard of the terms of an injunction entered by a Michigan court." GM Opening Br. on Appeal 49 (May 31, 1995). In response, petitioners noted, *inter alia*, that they "were not parties to the proceedings resulting in the Injunction." Appellees Br. 59 (July 20, 1995). Petitioners also submitted letters to the Court of Appeals informing it of decisions in other jurisdictions holding that the Michigan injunction could not be applied to bar nonparties to the Michigan proceeding from obtaining Elwell's testimony. *See* Letter of Jan. 16, 1996; April 23, 1996; and May 10, 1996.

On June 14, 1996, the Court of Appeals reversed the district court's judgment and ordered a new trial. As to the discovery sanction, the Court of Appeals agreed that GM had failed to comply with the district court's orders regarding discovery. App. 8a-9a & n.6. The Court of Appeals further agreed with the district court that GM's failure was "willful" and that the plaintiffs suffered prejudice. *Id.* "GM's conduct, therefore, clearly justified the imposition of Rule 37 sanctions." *Id.* at 9a. Nonetheless, the Court of Appeals held that the district court's sanction "was simply too severe for the facts presented and should have been drawn more narrowly." *Id.* at 10a. In particular, the court noted that "'there is a strong policy favoring a trial on the merits and against depriving a party of his day in court.'" *Id.* at 9a (citation omitted). "[T]he opportunity to be heard is a litigant's 'most precious right and should be sparingly

denied.'" *Id.* (citation omitted).[3]

On the Full Faith and Credit issue, however, the Court of Appeals disregarded its own teaching concerning the importance of the right to be heard. The court agreed with GM that the Michigan injunction prevented the district court from admitting Mr. Elwell's testimony. App. 13a-16a. Even though petitioners were unrepresented nonparties in the Michigan proceeding, the Court of Appeals held that they could be bound by it:

> [T]he district court emphasized the importance of other interests, such as the discovery rights of litigants, of which it believed the Michigan court was unaware when it entered the injunction. We find no evidence in the record to support such a statement. A stipulation in which GM expressly approved of Elwell's testimony in another case then pending was executed concurrently with the injunction. The Michigan court was, therefore, aware of the existence of at least some other parties' interests. The district court also would have assumed, as did the parties, that other similar litigation would follow; the injunction would otherwise have been unnecessary. Consequently, we find that the appellees failed to establish that the Michigan injunction was not entitled to full faith and credit.

Id. at 15a-16a (citation and footnote omitted).[4]

On June 26, 1996, petitioners filed a timely Petition for Rehearing En Banc, which under Eighth Circuit Rule 35A(4)

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[3] Petitioners do not seek this Court's review of the Court of Appeals' award of a new trial on the discovery sanctions issue. Rather, this Petition is directed solely at the Court of Appeals' decision with respect to the Full Faith and Credit question, which will limit the testimony that may be presented at retrial.

[4] The Court of Appeals also held that the jury instructions for "aggravating damages" were inadequate. App.10a-13a. Petitioners do not challenge this aspect of the Court of Appeals' ruling.

functioned both as a petition for rehearing and a suggestion for rehearing en banc, and which was treated by the Eighth Circuit as such. App. 1a. Petitioners argued that "[t]he 'agreed injunction' was entered without third parties being provided notice or any opportunity to contest the issuance of the injunction, and is contrary to the Due Process Clause." Pet. for Rehearing 10.

On July 26, 1996, the Eighth Circuit denied the rehearing petition without comment.

REASONS FOR GRANTING THE WRIT

GM attempted to prevent third parties, including petitioners, from obtaining the testimony of its former employee, Mr. Elwell, by entering into a stipulated consent judgment in Michigan state court as part of a settlement with Elwell. The Michigan injunction purported to bar Elwell from testifying even as to non-privileged, non-trade-secret information.

The Eighth Circuit has held that the Full Faith and Credit obligation precludes petitioners from obtaining Mr. Elwell's testimony in a federal court in Missouri. This decision, which will govern the new trial that the Court of Appeals has ordered in this case, is flatly inconsistent with both basic principles of due process and 28 U.S.C. § 1738. It is also flatly inconsistent with numerous decisions in the Courts of Appeals and the state courts holding that third parties cannot be bound as a matter of Full Faith and Credit to judgments of prior proceedings in which they did not participate and in which they were not represented.

If permitted to stand, the Eighth Circuit's ruling would provide wrongdoers with a blueprint for purchasing the silence of potentially vital witnesses, in violation of the ancient maxim that the public has a right to every man's evidence. The Court of Appeals' decision instructs wrongdoers that they need only enter into consent decrees with potential witnesses in which those witnesses promise, in exchange for money supplied in accompanying settlement agreements, never to testify in court.

Contrary to the Eighth Circuit's reasoning, such an assault upon the integrity of the judicial system finds no support in the Full Faith and Credit principle.

1. The Eighth Circuit's decision fundamentally misinterprets the Full Faith and Credit obligation of a federal court under 28 U.S.C. § 1738. As this Court has explained, the statute "directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 877 (1996). The Full Faith and Credit Act, however, does not — indeed, could not — override the basic precept of due process that "a judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

Thus, this Court has recently observed that the "limits on a state court's power to reflect estoppel rules" are a reflection of a "general consensus 'in Anglo-American jurisprudence'" that a person "'is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Richards v. Jefferson County*, 116 S. Ct. 1761, 1765-66 (1996) (quoting *Wilks*, 490 U.S. at 761-62, and *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). "This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Id.* at 1766 (citation omitted); *see also Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986) ("parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement . . . And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.").

The Eighth Circuit's decision flies in the face of this principle. It bars petitioners — who are concededly complete strangers to the Michigan proceeding that resulted in the Elwell

injunction — from obtaining his testimony in a wholly separate proceeding.

Yet the Full Faith and Credit obligation is "subject to the requirements of . . . the Due Process Clause." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). A party deprived of a "full and fair opportunity to litigate the claim or issue" cannot be bound under either 28 U.S.C. § 1738 or the Full Faith and Credit Clause. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81 (1982) (internal quotation omitted). "In such a case, there could be no constitutionally recognizable preclusion at all." *Id.* at 482-83; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) ("a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party").[5]

Not surprisingly, therefore, the decision below conflicts with the settled rule that the Full Faith and Credit principle does not mandate enforcement of judgments against non-parties who were wholly absent in the proceeding in which the judgment was rendered. *See, e.g., Riley v. New York Trust Co.*, 315 U.S. 343, 356 (1942) (Stone, C.J., concurring) ("A judgment so obtained is not entitled to full faith and credit with respect to those not parties."); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the

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[5] *See also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("A judgment rendered in violation of due process . . . is not entitled to full faith and credit elsewhere"); *Hanson v. Denckla*, 357 U.S. 235, 255 (1958) ("Delaware is under no obligation to give full faith and credit to a Florida judgment . . . offensive to the Due Process Clause of the Fourteenth Amendment"); Restatement (Second) of Conflict of Laws § 104 (1969) ("A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states.").

Constitution and statute of the United States prescribe . . . ."); *Fall v. Eastin*, 215 U.S. 1, 14 (1909) (Full Faith and Credit did not require Nebraska to bind purchaser of land to divorce decree entered in Washington, because Washington decree "gave no such equities as could be recognized" against third parties).

The Eighth Circuit's ruling conflicts with the decisions of numerous lower courts on this point.[6]

The Eighth Circuit's judgment is also in direct conflict with

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[6] *See, e.g., Stone v. Williams*, 970 F.2d 1043, 1058 (2d Cir. 1992) (persons bound to state-court judgment only if they were parties or privies in that proceeding), *cert. denied*, 508 U.S. 906 (1993); *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 180 (3d Cir.) (denying full faith and credit because "a consent decree is an agreement only between parties and does not bind or preclude the claims of non-parties"), *cert. denied*, 484 U.S. 849 (1987); *Jones v. Roach*, 575 P.2d 345, 348 (Ariz. App. 1977) ("a sister state need not give full faith and credit to another state's judgment if . . . the judgment was obtained through lack of due process").

See also City of Philadelphia v. Stadler, 395 A.2d 1300, 1303 (N.J. Super. Ct. 1978) ("a court of this State, when asked to enforce a foreign state judgment, must deny full faith and credit if the rendering court . . . failed to provide adequate notice and an opportunity to be heard"), *aff'd*, 413 A.2d 996 (N.J. App.), *certif. denied*, 427 A.2d 563 (N.J. 1980), *cert. denied*, 450 U.S. 997 (1981); *Wheeler v. Stewart Mapping Serv.*, 377 N.Y.S.2d 965, 968 (App. Div. 1976) ("A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states.") (internal quotation omitted), *aff'd*, 366 N.E.2d 286 (N.Y. 1977); *Boyles v. Boyles*, 302 S.E.2d 790, 793 (N.C. 1983) (rendering court must "have afforded the parties adequate notice and an opportunity to be heard before full faith and credit will be accorded the judgment"); *Commonwealth of Pennsylvania v. Granito*, 407 A.2d 1371, 1372 (Pa. Commonw. Ct. 1979) (due process forbids full faith and credit "unless the parties have been given adequate notice and an opportunity to be heard"); *Hall v. McCormick*, 580 A.2d 968, 969 (Vt. 1990) (full faith and credit does not apply where "the judgment was rendered without adequate opportunity for defendant to be heard"); *R.R. Gable, Inc. v. Burrows*, 649 P.2d 177, 179 (Wash. App.) ("One such exception [to full faith and credit] is for judgments rendered in violation of the due process requirement that a defendant receive adequate notice and be given a meaningful opportunity to be heard."), *review denied*, 48 Wash.2d 1008 (1982), *cert. denied*, 461 U.S. 957 (1983).

the decisions of at least 31 other lower courts concerning plaintiffs' right to have Elwell testify despite the injunction. Seven appellate tribunals and 24 trial courts have permitted Elwell to testify as to non-privileged and non-trade-secret matters. *See* Addendum to Petition for Writ of Certiorari. For example, the California court of appeal explained, in the course of holding the Michigan injunction unenforceable in California, that:

> The Michigan injunction adversely affected petitioners' causes of action against GM by effectively destroying their ability to prove a substantial portion of their case. . . . Neither the petitioners nor their causes of action were subject to the jurisdiction of the Michigan court.

Smith v. Superior Court, 49 Cal. Rptr. 2d 20, 25 (Ct. App. 1996), *review denied*, 1996 Cal. LEXIS 2185 (Cal. Apr. 18, 1996). The Washington Court of Appeals similarly observed that, with respect to the Full Faith and Credit obligation, "[a] judgment cannot affect a stranger to the original lawsuit without violating procedural due process." *Worden v. General Motors Corp.*, Case No. 18127-4-II, slip op. 4 (Wash. App. May 20, 1994); *see also Head v. General Motors Corp.*, CA No. 6:95-3613-20, slip op. 2-3 (D.S.C. July 17, 1996) ("the Michigan injunction is not entitled to full faith and credit because Head was neither a party to nor in privity with a party to the prior proceeding in Michigan").

Indeed, prior to the decision below, no appellate court had ever barred Elwell from testifying at all. Now, however, the decision below, if allowed to stand, will be controlling law in the Eighth Circuit with respect to the Full Faith and Credit obligation.[7]

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[7] In a few questionable decisions, some trial courts have held that Elwell could not testify. App. 35a. But in any event, these decisions were rendered in readily distinguishable circumstances, as in instances where Elwell had

2. Another reason that the Michigan injunction is not entitled to Full Faith and Credit is that it is flatly inconsistent with "the ancient proposition of law" that "the public . . . has a right to every man's evidence." *United States v. Nixon*, 418 U.S. 693, 709 (1974) (internal quotation omitted); *see also Jaffee v. Redmond*, 116 S. Ct. 1923, 1928 (1996) (the "right to every man's evidence" is a "fundamental maxim" recognized "[f]or more than three centuries") (internal quotation omitted); *Trammel v. United States*, 445 U.S. 40, 50 (1980) (maxim is a "fundamental principle" of law); *United States v. Mandujano*, 425 U.S. 564, 572 (1976) ("long accepted in America as a hornbook proposition"); *United States v. Burr*, 25 Fed. Cas. 38, 39 (No. 14,692e) (CC Va. 1807) (Marshall, Circuit Justice) ("[E]very person is compellable to bear testimony in a court of justice."). As early as 1562, persons having relevant knowledge were compelled by law in England to give evidence in court,[8] and in 1612 Lord Bacon observed that all subjects owed the King "their knowledge and discovery." *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (citing *Countess of Shrewsbury's Case*, 2 How. St.Tr. 769, 778 (1612)). Both the Duke of Argyll and Lord Chancellor Hardwicke invoked the principle during the 1742 debate over the Bill to Indemnify Evidence, which would have granted immunity to witnesses against Sir Robert Walpole, first Earl of Oxford. *Jaffee*, 116 S. Ct. at 1928 n.8.

In short, what GM purported to purchase from Elwell — his silence even as to non-privileged matters — was not Elwell's to sell. Just as judicial precedents "are not merely the property of private litigants," *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 392 (1994) (internal quotation omitted), so too non-privileged knowledge may not simply be

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previously assisted GM's attorneys in preparing for the very *same* trial in which the plaintiff had sought to call him as a witness. *Id.* In *Harris v. General Motors Corp.*, No. 111342 (Super. Ct. Ventura Co., Calif.), for example, Elwell had been named, pretrial, as an expert witness *by GM*.

[8] *See* Statute of Elizabeth, 5 Eliz. 1, c. 9, § 12 (1562).

bargained away. Rather, such information is subject to a public right of access in judicial proceedings. Otherwise, litigants could always enter into consent decrees with prospective adverse witnesses to prevent their testimony.[9]

Directly apposite here is this Court's decision in *Ex Parte Uppercu*, 239 U.S. 435 (1915) (Holmes, J.). There, the party seeking discovery had not participated in a prior case, in which a court had purported to seal all documents and thereby make them unavailable for evidence in other proceedings. In reversing a lower court's order denying petitioner leave to inspect the documents, this Court opined:

> The necessities of litigation and the requirements of justice found a new right of a wholly different kind. So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, . . . Neither the parties to the original cause nor the deponents have any privilege, and the mere unwillingness of an unprivileged person to have the evidence used cannot be strengthened by such a judicial fiat as this, forbidding it, however proper and effective the sealing may have been against the public at large . . . . As against the petitioner the order has no judicial character, but is simply an unauthorized exclusion of him by virtue of *de facto* power.

Id. at 440-41. Applying *Uppercu* to the very Michigan injunction involved here, a California court of appeals has explained that the Michigan decree cannot prevent third parties from obtaining Elwell's testimony:

> The principle expressed in *Ex Parte Uppercu* is directly

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[9] *Cf. EEOC v. Astra, USA, Inc.*, No. 96-1751, 1996 U.S. App. LEXIS 23355, *14-16 (1st. Cir. Sept. 6, 1996) (voiding agreements between employer and employees in which the latter committed not to cooperate with the EEOC).

> applicable here. The Michigan court had no jurisdiction over the petitioners, who had neither notice of nor opportunity to contest the issuance of the injunction, a decree obtained as a result of a purchased settlement in a completely unrelated case. Enforcement of the injunction would substantially impair the right of petitioners and others similarly situated to full acquisition of evidence necessary to prosecute their claims against GM without any possible legal redress. Just as in *Uppercu*, enforcement of the injunction against unrelated third parties who are not even remotely connected with the employment dispute between Elwell and GM would constitute acquiescence to an unauthorized exercise of de facto power. Bedrock constitutional principles mandating procedural fairness preclude such a result.

Smith v. Superior Court, 49 Cal. Rptr. 2d at 27.

3. A further reason for not giving the Michigan judgment binding effect is that it involved not a money judgment but an injunctive decree. This Court has never resolved the application of the Full Faith and Credit obligation in this context. As the Restatement (Second) of Conflict of Laws explains:

> The Supreme Court of the United States has not had occasion to determine whether full faith and credit requires a State of the United States to enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act. No definite statement on the point is therefore made in the rule of this Section.

Restatement (Second) of Conflict of Laws § 102, comment c. The Restatement speculates that "[i]t may well be that the Supreme Court, when presented with the question, will hold that the enforcement of such decrees is required by full faith and

credit." *Id.* On the other hand:

> [I]n support of the view that the enforcement of such a sister State decree lies in the discretion of the forum is the argument made in § 449 of the original Restatement of this Subject that the granting or denying of equitable relief, other than an order for the payment of money, is a matter of discretion and that "[t]he decision by one court to give specific relief . . . will not limit another court and thus exclude the use of the discretion of the second court." Also the enforcement of a judgment ordering or enjoining the doing of an act might on occasion require continuing supervision by the enforcing court or be otherwise onerous.

Id.; *see also* 42 Am. Jur.2d Injunctions § 227 (citing cases holding that injunctions are not entitled to Full Faith and Credit); Michael Collins, Comment, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance*, 11 B.C. Envtl. Aff. L. Rev. 295, 397 n. 474 (1984) ("The Supreme Court has not ruled whether full faith and credit require the enforcement of another state's equitable decrees. State courts have typically assumed it does not."); Comment, *Developments in the Law— Injunctions*, 78 Harv. L. Rev. 994, 1044 (1965) (distinguishing money judgments from injunctions for Full Faith and Credit purposes).

There are in fact forceful reasons for greater reluctance to require one jurisdiction to honor an injunctive decree of another regardless of the second jurisdiction's substantive policies. An obligation to enforce a decree of another state's judiciary could end up requiring the second jurisdiction to use its supervisory and contempt powers to police an order that it might well have refused to enter in the first instance. Consider, for example, an order by State A compelling a factory operating and employing thousands of people in State B to stop what State A's courts deem to be a "pollution" of the air in State A. Requiring State

B's courts to enforce such an order raises concerns both about the extraterritorial application of state policy choices, *see BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1597 & n.16 (1996), and about "commandeer[ing]" state governmental units into the service of other sovereigns. *New York v. United States*, 505 U.S. 144, 161, 170, 173, 176 (1992) (citation omitted).

Indeed, the Michigan injunction itself illustrates the hazards of attempting to give binding effect to out-of-state injunctions. Numerous lower courts have permitted Mr. Elwell to testify as to non-privileged, non-trade-secrets information within his knowledge on the ground that the public policy of full discovery and disclosure demands such a result.[10] As one court reasoned in permitting Elwell to testify, "[p]ermanent injunctions entered in a sister state offer more potential for interference with the forum state's interests as a sovereign entity than do monetary judgments. Indeed, the permanent injunction at issue in this case affects the sovereign interests of Colorado in much the same way as would the application of a sister state's law." *Bray v. General*

[10] *See, e.g., Williams v. General Motors Corp.*, 147 F.R.D. 270, 273 (S.D. Ga. 1993) ("This Court concludes that the public interest — which must be weighed in any consideration of injunctive relief — is not served in this instance by prohibiting Elwell from testifying in Georgia as to matters not within the scope of an attorney-client or work-product privilege, or which divulgence would not constitute misappropriation of a trade secret. Any interest GM might have in silencing Elwell as to unprivileged or non-trade-secret information is outweighed by the public interest in full and fair discovery."); *Bishop v. General Motors Corp.*, No. 94-286-S, slip op. 2 (E.D. Okla. June 29, 1994) ("to the extent the Michigan injunction prohibits Elwell from testifying to matters outside the scope of any privilege, or with respect to trade secrets, it violates Oklahoma and federal court public policy of full discovery, [and] the Full Faith and Credit Clause does not require this court to give full effect to another state's judgment which clearly violates the public policy of full disclosure under both Oklahoma and federal law"); *Ruskin v. General Motors Corp.*, No. CV930073883, 1995 WL 41399, *2 (Conn. Super. Ct.) (Jan. 25, 1995) ("the Michigan injunction involves a blanket prohibition that contravenes Connecticut public policy and hence is not entitled to full faith and credit").

Motors Corp., No. 93-C-265, slip op. 5 (D. Colo. Jan. 20, 1995). *See also Meenach v. General Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1996) ("neither the Full Faith and Credit Clause nor rules of comity require compulsory recognition of an injunction issued in another jurisdiction"). A California court of appeal explained that the injunction "not only violates our fundamental public policy against suppression of evidence," but also "would undermine the fundamental integrity of this state's judicial system." *Smith v. Superior Court*, 49 Cal. Rptr. 2d at 27.[11]

This Court has recognized that "the Full Faith and Credit Clause does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979); *see also Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939) ("It has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy.").

This principle demonstrates that the Full Faith and Credit obligation should not be deemed to extend to injunctive decrees, particularly the Michigan injunction enforced by the Eighth Circuit.

[11] Similarly, a federal district court in Arizona held that "Arizona public policy would be violated by enforcing the blanket prohibition of the Michigan injunction." *Hannah v. General Motors Corp.*, No. Civ 93-1368 PHX RCB, slip op. 4 (D. Ariz. May 30, 1996) (emphasis omitted). The injunction "prevents the jury from making a determination based upon all the relevant, admissible evidence. The effect is an obscured search for truth." *Id.* at 5; *see also Kibler v. General Motors Corp.*, No. C94-1494R, slip op. 2 (W.D. Wash. July 10, 1996) ("Washington's strong public policy in favor of full disclosure in the search for truth at trial outweighs the full faith and credit concerns").

Under Missouri public policy, a party should be provided "with access to anything that is 'relevant' to the proceedings and subject matter not protected by privilege." *State v. Koehr*, 831 S.W.2d 926, 927 (Mo. 1992) (en banc).

4. An additional reason for not according the Michigan judgment Full Faith and Credit is "the old and well-established judicially declared rule that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here." *Donovan v. City of Dallas*, 377 U.S. 408, 412-13 (1964). This rule is premised on the general maxim that "state and federal courts would not *interfere with* or try to restrain each other's proceedings." *Id.* at 412 (emphasis added). And it does not matter whether an injunction is "addressed to the parties rather than to the federal court itself." *Id.* at 413; *see also General Atomic Co. v. Felter*, 434 U.S. 12, 17-18 (1977) (*per curiam*).

Here, of course, the *effect* of the Michigan injunction, as construed by the Eighth Circuit, is to bar petitioners from introducing Elwell's testimony in a federal court in Missouri. If a state court may enjoin federal court litigants in such a manner, then there is nothing to prevent a state court from barring parties in federal court from referring to specified documentary evidence; from prohibiting plaintiffs (or defendants) from asserting particular legal claims (or defenses); or otherwise from controlling federal court litigation. In short, the Eighth Circuit's decision would eviscerate the rule of *Donovan v. Dallas*, the purpose of which is to avoid "the difficulties that are the necessary result of an attempt to exercise [judicial] power over a party who is a litigant in another and independent forum." 377 U.S. at 413 (internal quotation omitted).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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ADDENDUM

COURT DECISIONS ALLOWING ELWELL TESTIMONY

APPELLATE COURT DECISIONS:

1. *Carpenter v. General Motors Corp.*, Case No. 93-CA-1788-OA, (Ky. Ct. App. Sept. 20, 1993) (setting aside lower court order granting defendant General Motors Corporation's motion to quash plaintiff's motion to take out-of-state deposition of Ronald Elwell and granting plaintiff's motion to take deposition of Elwell).

2. *General Motors Corp. v. The Honorable Benjamin Euresti, Jr., Judge*, Case No. 94-1092 (Tex. Nov. 12, 1994) (overruling relator General Motors Corporation's motion for leave to file petition for writ of mandamus); *Correa v. General Motors Corp.*, No. 93-04-1704-A (Dist. Ct. Cameron Co. Sept. 22, 1994) (order granting plaintiffs' motion to depose Ronald Elwell).

3. *General Motors Corp. v. The Honorable J. Ray Gayle, III, Judge*, Case No. 94-1163 (Tex. Nov. 15, 1994) (overruling relator General Motors Corporation's motion for leave to file Petition for Writ of Mandamus and Motion for Emergency Stay); *General Motors Corporation, Relator v. The Honorable J. Ray Gayle, III, Judge, Respondent*, Case No. B14-94-01082-CV (Tex. Civ. App. Nov. 10, 1994) (denying relator General Motors Corporation's petition for leave to file petition for writ of mandamus and emergency motion to stay deposition of Ronald Elwell); Delarosa v. General Motors Corporation, et al., Case No. 90G2176; *Meche v. General Motors Corp.*, Case No. 91G1378; *Robinson v. General Motors Corp.*, Case No. 93G2052; *Heidaker v. General Motors Corp.*, Case No. 93G1357; *Norton (Daniel) v. General Motors Corp.*, Case No.

93M2036 (Dist. Ct. Brazoria Co. July 12, 1994) (granting plaintiffs' collective motions for deposition of Ronald Elwell); "Order on Motion of Rehearing and Motions to Permit Videotape Deposition of Ronald E. Elwell" (Aug. 8, 1994) (granting plaintiffs motions to permit videotape deposition of Elwell).

4. *General Motors Corp. v. The Honorable Robert Garza, Judge*, Case No. 94-0494 (Tex. June 29, 1994) (granting relator General Motors Corporation's motion to withdraw motion for leave to file petition for writ of mandamus (pursuant to settlement)); *General Motors Corp. v. The Honorable Robert Garza, Judge*, Cause No. 13-94-168-CV (Tex. Civ. App. May 3, 1994) (overruling relator General Motors Corporation's motion for leave to file petition for writ of mandamus) (rendered May 3, 1994); *Huerta v. General Motors Corp.*, Cause No. 93-12-7022-B (Dist. Ct. Cameron Co. Mar. 7, 1994) (granting plaintiff's motion to consult with and take the deposition of Ronald Elwell).

5. *Meenach v. General Motors Corp.*, 891 S.W.2d 398 (Ky. 1995) (holding that the lower court may modify the Michigan injunction to allow plaintiffs access to non-protected facts in the possession of Elwell).

6. *Smith v. Superior Court (General Motors Corp., Real Party in Interest); Stephens v. Superior Court (General Motors Corp., Real Party in Interest)*, 49 Cal.Rptr.2d 20 (Cal. App. 5th Dist. 1996) (granting plaintiffs' motions to obtain the testimony of Ronald Elwell).

7. *Worden v. General Motors Corp.*, Case No. 18127-4-II (Wash. App. May 20, 1994) (upholding trial court's order granting plaintiffs' motion for video deposition and/or trial testimony of Ronald Elwell and denying defendant's motion for protective order to prevent Elwell's testimony); *Worden v.*

General Motors Corp., Case No. 92-2-11770-9 (Sup. Ct. of Pierce Co. Mar. 11, 1994) (denying General Motors Corporation's motion for protective order to prevent testimony of Ronald Elwell and granting plaintiffs' motion for videotaped deposition and/or trial testimony of Elwell).

TRIAL COURT ORDERS:

8. *Anderson v. General Motors Corp.*, Case No. 342-160528-95 (Dist. Ct. Tarrant Co., Tex. Mar. 19, 1996) (granting plaintiffs' motion to obtain the testimony of Ronald Elwell and imposing conditional sanctions upon GM if it seeks and is denied mandamus relief).

9. *Bishop v. General Motors Corp.*, Case No. 94-286-S, (E.D. Okla. June 29, 1994) (denying General Motors' for protective order preventing the taking of Ronald Elwell's deposition).

10. *Bray v. General Motors Corp.*, Civil Action No. 93-C-2656 (D. Colo. Jan. 20, 1995) (granting plaintiff's motion to permit the deposition of Ronald Elwell).

11. *Colmenares v. General Motors Corp.*, Case No. BC004030 (Super. Ct. Los Angeles Co. Sept. 13, 1993) (denying General Motors Corporation's motion for protective order that deposition of Ronald Elwell not be taken) (entered September 13, 1993).

12. *Diaz v. General Motors Corp.*, Cause No. C-079-94-B, (Dist. Ct. Hidalgo Co. Aug. 31, 1994) (granting plaintiff's motion to take deposition of Ronald Elwell).

13. *Dixon v. General Motors Corp.*, Civil Action No. 2:94-CV-314PS (S. D. Miss. May 1, 1995) (granting plaintiffs' motion to call Ronald Elwell at trial and denying General Motors

Corporation's motion for protective order).

14. *Downen v. General Motors Corp.*, Case No. CIV 144604 (Super. Ct. Ventura Co., Calif. May 5, 1995) (granting plaintiff's motion to take videotaped deposition of Ronald E. Elwell).

15. *Gonzales v. General Motors Corp.*, CV-93-87-M-CCL (D. Mont. Feb. 14, 1995) (granting plaintiff's motion to take deposition of Ronald Elwell).

16. *Hannah v. General Motors Corp.*, Case No. CIV 93-1368 PHX RCB (D. Ariz. May 29, 1996) (granting plaintiffs' motion to vacate and/or modify the Order regarding Elwell testimony and denying defendant's motion to strike Elwell from plaintiffs' witness list); *Hannah v. General Motors Corp.*, Case No. CIV 93-1368 PHX RCB (D. Ariz. Feb. 4, 1996) (deferring ruling on defendant's motion to strike Elwell from plaintiff's witness list and preclude his testimony; allowing plaintiffs 90 days to petition the Michigan court for a modification of the permanent injunction).

17. *Head v. General Motors Corp.*, CA No. 6:95-3613-20 (D.S.C. July 17, 1996) (granting plaintiff's motion to allow Elwell to testify).

18. *Kibler v. General Motors Corp.*, No. C94-1494R (W.D. Wash. July 10, 1996) (denying defendant's motion to prevent Elwell from testifying as expert witness).

19. *Koval v. General Motors Corp.*, Case No. 137016 (Ct. Common Pleas, Cuyahoga Co., Ohio Aug. 28, 1992) (ordering that deposition of Ronald Elwell may proceed as noticed).

20. *Martin v. General Motors Corp.*, Case No. 92CIV0724 (Ct. Common Pleas, Medina Co., Ohio Oct. 21, 1994) (ordering that the deposition of Ronald Elwell be taken).

21. *Norton v. General Motors Corp.*, Case No 3:93-CV-62(W) (S) (S.D. Miss. Nov. 20, 1993) (granting plaintiffs' motion to take Elwell's deposition).

22. *Peoples v. General Motors Corp.*, Case No. CV 91-490J (Cir. Ct., Limestone Co., Ala. June 8, 1993) (denying General Motors' motion to quash plaintiff's deposition subpoena to Elwell).

23. *Pollan v. General Motors Corp.*, Case No. 92-47545 (Dist. Ct., Harris Co., Tex. Dec. 27, 1993) (denying General Motors' motion for reconsideration of order permitting deposition of Ron Elwell).

24. *Renze v. General Motors Corp./O'Connor v. General Motors Corp.*, LAW No. L93-2080 (Cir. Ct. of City of Va. Beach, Va. Apr. 14, 1995) (granting plaintiffs' motion to consult with and take the video deposition of Ronald Elwell and denying General Motors Corporation's motion for protective order prohibiting plaintiffs from taking the deposition of or consulting with Ronald Elwell) .

25. *Roberts v. General Motors Corp.*, Case No. E-12577 (Super. Ct. Fulton Co., Ga. Dec. 20, 1993) (granting plaintiff's motion for order permitting deposition of Ronald Elwell).

26. *Ruskin v. General Motors Corp.*, Case No. CV930073883, 1995 WL 41399 (Super. Ct., Litchfield, Conn. Jan. 25, 1995) (granting plaintiff's motion to take deposition of Elwell).

27. *Shaffer-Kleoppel v. General Motors Corp.*, Case No. 93-0498-CV-W-8 (W.D. Mo.) (granting plaintiff's motion to depose Ronald Elwell and ordering that deposition shall not be limited to factual testimony but may include opinion testimony).

28. *Shoemaker v. General Motors Corp.*, Case No. 91-0990-CV-W-8; *Baker v. General Motors Corp.*, Case No. 91-0991-CV-W-8, (W.D. Mo. June 18, 1993) (granting plaintiffs' motion to take videotape deposition of Ronald Elwell and denying General Motors' motion for protective order).

29. *Thompson v. GMC Truck Center*, Case No. BC045258 (Super. Ct. Los Angeles Co., Calif. Apr. 7, 1994) (permitting Ronald Elwell to testify at trial over defendant's contrary motion).

30. *Vasquez v. General Motors Corp.*, Case No. 223079, (Super. Ct. Kern Co., Calif. May 6, 1994) (granting plaintiff's motion for an order permitting testimony by expert Ronald Elwell).

31. *Williams v. General Motors Corporation*, 147 F.R.D. 270 (S.D. Ga. 1993) (granting plaintiffs' motion to depose Ronald Elwell).

APPENDIX A

Kenneth Lee Baker, et al., Appellees,

v.

General Motors Corporation, Appellant.

No. 95-1604 WMKC

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

July 25, 1996

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge McMillian and Judge Loken took no part in the consideration or decision of this case.

July 25, 1996

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1604

Kenneth Lee Baker; Steven Robert Baker by next friend, Melissa Thomas, Appellees,	*
v.	* Appeal from the U.S. District Court for the Western District of Missouri
General Motors Corporation, Appellant.	*
The Product Liability Advisory Council, Inc., Amicus Curiae.	*

Submitted: January 8, 1996
Filed: June 14, 1996

Before BEAM, MORRIS SHEPPARD ARNOLD, Circuit Judges, and ALSOP,* District Judge.

BEAM, Circuit Judge.

In this products liability action, General Motors Corporation

* The HONORABLE DONALD D. ALSOP, United States District Judge for the District of Minnesota, sitting by designation.

(GM) appeals a jury verdict in favor of plaintiffs for 11.3 million dollars. GM argues that the district court erred in: (1) entering a discovery sanction against it; (2) instructing the jury on punitive damages; and (3) allowing a former GM employee to testify at deposition and trial. We reverse.

I. BACKGROUND

This case arose out of an automobile accident in which Gerald Shoemaker and Beverly Garner were killed. Shoemaker and Garner collided head-on with another car after which a fire broke out in the engine compartment of their vehicle. Garner's sons, Kenneth and Steven Baker, brought this products liability action alleging that the engine fire was caused by a faulty fuel pump in the Chevrolet S-10 Blazer in which their mother was riding and that this defect caused her death. GM asserted that the fuel pump was neither faulty nor the cause of the fire and that instead, Garner died as a result of collision impact injuries.

As in any products liability case, the cornerstone of the plaintiffs' case is the product's defect. To help prove that defect, the plaintiffs asked GM to produce its 1241 reports (1241 reports are essentially complaints from customers regarding GM products) involving similar accidents. GM represented that all 1241 reports were indexed in summary form in its central computer file. GM stated that its customary response to discovery requests was to produce these 1241summaries instead of the actual 1241 reports. From these summaries, plaintiffs could request the specific 1241 reports in which they were interested. Both the 1241 summaries and the reports proved difficult to obtain from GM and were the source of several discovery disputes during the months before trial.

On July 9, 1993, after several discovery stalemates, the district court issued an order which directed GM to produce "summaries of 1241 forms on non-collision under-hood electrical fires within 10 days" of the order. On July 20, GM produced a group of computer summaries, none predating 1988.

GM stated that pre-1988 reports were no longer available due to a five-year retention policy and that its production, therefore, amounted to full compliance with the July 9th order.

After learning from other plaintiffs' attorneys in other GM cases that they had received 1241 reports which were allegedly over five years old, the plaintiffs asked the district court to sanction GM for what they believed to be abuses in the discovery process. On August 2, GM explained that although there were several exceptions to its five-year retention policy, none of these exceptions had resulted in the retention of any 1241 reports (or summaries) over five years old which were relevant to this case.

A few days later, the plaintiffs found more 1241 reports over five years old in a National Highway Transportation Safety Administration (NHTSA) file. The file had been compiled by the NHTSA during one of its investigations into possible automobile defects. The plaintiffs then supplemented their request for sanctions against GM. This time, GM stated that it had never occurred to anyone to search the NHTSA files for older 1241 reports and cited the public availability of the reports to justify its lack of production. GM did, however, expand its records search at this time. Two days before trial, GM produced another five hundred 1241 reports, some of which duplicated those found in the NHTSA file. GM claimed, however, that few of these reports were responsive to the July 9th order. Following this production, the district court granted the plaintiffs' request for sanctions against GM.

Noting GM's continuing delay in the discovery process, the district court ordered GM's affirmative defenses stricken and further ordered that:

> the following matters, which relate to the substance of the July 9, 1993 order, shall be established for the purposes of this action:
> The 1985 Chevrolet S-10 Blazer at issue in this case was defective in that General Motors placed an electric fuel pump in the fuel tank without an adequate mechanism to shut off the pump in the event of a malfunction or collision and that General Motors has been aware of this defect and hazard for many years. The fuel pump in the 1985 Chevrolet S-10 Blazer in this case continued to operate after the engine stopped upon impact.

Baker v. General Motors Corp., 159 F.R.D. 519, 528 (W.D. Mo. 1994) (*Baker I*). The case proceeded to trial on the sole issue of whether the defect in the 1985 Chevy Blazer "directly caused or directly contributed to cause" the death of Beverly Garner. Trial Trans. at 1725.

At trial, the plaintiffs called former GM employee, Ronald Elwell, to testify.[1] Prior to trial, Elwell's testimony had been the subject of much debate. Elwell and GM had been involved in an earlier employment dispute which had led Elwell to sue GM for wrongful discharge. GM counterclaimed, alleging that in testifying for various plaintiffs (and against GM) in other products liability actions, Elwell was divulging privileged information. In settling the wrongful discharge claim, Elwell consented to a Michigan injunction which barred him from testifying against GM in products liability cases. GM and Elwell also entered into a settlement agreement[2] memorializing, among other things, their monetary settlement and GM's desire to prevent future damaging testimony by Elwell. The settlement agreement provided, in part, that if Elwell were ordered to testify by a court or other tribunal, he could do so without violating the settlement agreement.

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[1] For 15 of his 30 years of credited service with GM, Elwell was a member of GM's Engineering Analysis staff which studied the performance of GM vehicles, especially those involved in products liability litigation. Based on this experience, Elwell had assisted GM lawyers in defending products liability actions.

[2] Although the settlement agreement was sealed by the court below, we make use of the agreement to the extent necessary for our preparation of this opinion.

In this case, GM strenuously objected to both Elwell's deposition and trial testimony contending that Elwell's testimony was barred by the Michigan injunction. The plaintiffs countered that the Michigan injunction was not entitled to full faith and credit by the district court. Alternatively, they argued that even if the injunction were entitled to such credit, the settlement agreement allowed Elwell to testify. After in camera review of the Michigan injunction and the settlement agreement, the district court allowed the plaintiffs to depose Elwell and to call him as a witness at trial.

Elwell's trial testimony concerned his research on fuel-fed engine fires and the existence and contents of the "Ivey" document. The Ivey document is a value analysis document prepared by Edward Ivey, an Advance Design employee, and allegedly circulated among selected top GM and Oldsmobile officials. The Oldsmobile officials, according to Elwell's testimony, were at that time responsible for the overall fuel system design of GM vehicles. The document analyzed the potential expense of the loss of human life per vehicle due to fuel-fed engine fires. According to Elwell, the analysis implied that it would be worth only $ 2.40 per vehicle in operation for GM to prevent such fuel-fed fires.

At the end of trial, the district court incorporated its Rule 37 sanction language into the jury instructions. The district court also instructed the jury as to both compensatory and aggravating circumstance damages.[3] GM objected to the jury instructions,

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[3] The only explanatory damages instruction given, as to either type of damages, read in relevant part:

> In determining what amount would be fair and just compensation in this case you may consider the pecuniary losses suffered by reason of the death and the loss of companionship, comfort, instruction, guidance, counsel, training and support which decedent provided to Kenneth Baker and Steven Baker if any such loss or losses are found by you. In addition, you may award such damages as

arguing, inter alia, that the instructions gave the jury insufficient guidance in awarding what were essentially punitive damages.[4] GM also objected to the lack of differentiation between compensatory and punitive damages in the verdict form. Following trial, the jury awarded the plaintiffs 11.3 million dollars in damages, without apportioning between compensatory and aggravating circumstance damages.

II. DISCUSSION

A. The Discovery Sanction

GM argues that the district court abused its discretion in entering the discovery sanction. The district court has broad discretion in issuing sanctions for discovery abuse and its decision will be upheld absent an abuse of discretion. *Anderson v. Home Ins. Co.*, 724 F.2d 82, 84 (8th Cir. 1983) (citing *Fox v. Studebaker-Worthington, Inc.*, 516 F.2d 989 (8th Cir. 1975)). Our scope of review of the district court's actions is, therefore, very narrow. *Prow v. Medtronic, Inc.*, 770 F.2d 117, 122 (8th

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> Beverly Sue Garner may have suffered between the time of injury and the time of death and for the recovery of which the deceased may have maintained an action had death not ensued. You may consider any mitigating or aggravating circumstances attendant upon the death if you find any such circumstances. You may not consider grief and bereavement by reason of the death.

Trial Trans. at 1727.

[4] GM's objections included the following claims: (1) there was inadequate evidence to support the submission of an aggravating circumstance damages instruction to the jury; (2) the lack of evidence of aggravating circumstance damages denied GM the opportunity to defend against such damages; (3) the jury was given insufficient standards for imposing aggravating circumstance damages through vague and unconstitutional instructions; and (4) the failure to apportion between compensatory and aggravating circumstance damages was error.

Cir. 1985).

We must first determine whether the district court was correct in finding a discovery violation to support its imposition of the sanction under Federal Rule of Civil Procedure 37 (Rule 37). To impose Rule 37 sanctions, there must be: (1) a court order compelling discovery; (2) a violation of that order which is wilful;[5] and (3) prejudice to the other party from the violation. *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1330 (8th Cir. 1986); *Edgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977). In this case, all of these elements were present.

The July 9th order satisfies the first requirement, that there be a discovery order in place. GM failed to fully comply with the order within the ten-day required period, as evidenced by its further production of 1241 reports in early August, just prior to trial.[6] The district court's finding of prejudice is supported by

[5] Severe sanctions, such as that entered here, are often reserved for wilful or bad faith violations of court orders. *Societe Int'l v. Rogers*, 357 U.S. 197, 212 (1958). This court has determined, however, that a "deliberate default" will suffice. *Anderson*, 724 F.2d at 84 (citing *Lorin Corp. v. Goto & Co.*, 700 F.2d 1202, 1208 (8th Cir. 1983) (deliberateness includes failure to respond to discovery requests and failure to provide full information following a court order)). In any event, we agree with the district court's conclusion that GM's noncompliance was both deliberate and wilful. *Baker I*, 159 F.R.D. at 524.

[6] GM argues that the July 9th order only required production of computer summaries of 1241 reports. The district court seemed to share that belief. *Baker I*, 159 F.R.D. at 524. However, the express words of the order made no such limitation. GM further argues that it only needed to produce the summaries found on its central computer file, because the district court and the plaintiffs understood that to be GM's customary discovery response technique. Again, the discovery order contains no such limitation. Furthermore, as the district court explained, the order "referred only to computer summaries because defendant's counsel represented to the Court that all 1241's that General Motors could produce in hard copy were indexed on the computer database." *Id.* This assurance was, at best, inaccurate. Consequently, GM cannot now rely on its own interpretation of the discovery order's limiting language which was employed largely because of its own misrepresentations. Similarly, GM cannot feign compliance with the discovery order by producing the actual 1241 reports, instead of the

the produced documents themselves. GM's late production of the 1241 reports prevented the plaintiffs from researching them completely, essentially depriving them of the information which they were due. GM's conduct, therefore, clearly justified the imposition of Rule 37 sanctions. However, this conclusion does not end our inquiry. We must determine whether the sanction imposed was just and specifically related to the claim at issue in the discovery order. *See* Fed. R. Civ. P. 37(b)(2); *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982). In this case, we do not believe the sanction met that standard.

As this court has stated previously, "there is a strong policy favoring a trial on the merits and against depriving a party of his day in court." *Fox*, 516 F.2d at 996. The sanction in this case failed to achieve a balance between the policies of preventing discovery delays and deciding cases on the merits. Such a balance recognizes that the opportunity to be heard is a litigant's "most precious right and should be sparingly denied." *Edgar*, 548 F.2d at 773. GM was not given the right to be heard. Instead, the jury was asked, essentially, to place a monetary value on the loss of human life. Before issuing such a sanction, fairness required the court to consider whether a more "just and effective" sanction was available. *Id.* In this situation, other, less

summaries as directed by the order.

GM apparently wants this court to overturn the district court's factual findings leading up to the imposition of sanctions. This, we refuse to do. *See generally Dillon v. Nissan Motor Co.*, 986 F.2d 263, 267 (8th Cir. 1993) (both sanction imposed under court's inherent authority and factual basis for sanction are reviewed under abuse of discretion standard); *Laclede Gas Co. v. G.W. Warnecke Corp.*, 604 F.2d 561, 565 (8th Cir. 1979) (party subject to sanction for violating letter and spirit of discovery rules as well as court's pretrial orders). GM cannot take a limited view of its duty to comply with discovery requests simply because it is customary for it to do so. GM was ordered to produce the summaries because they were supposed to lead to the production of all available 1241 reports. Because GM's assurance failed, so does its interpretation of the discovery order.

severe sanctions (including monetary fines against GM and continuances for the plaintiffs) were both available and appropriate.

While we do not condone GM's failure to meet its discovery obligations, we find that the sanction chosen by the district court was simply too severe for the facts presented and should have been drawn more narrowly. *See English v. 21st Phoenix Corp.*, 590 F.2d 723, 728 (8th Cir.), *cert. denied*, 444 U.S. 832 (1979). By providing that the fuel pump was defective and continued to operate here, the sanction forced the jury to find for the plaintiffs. Although the case ostensibly proceeded to trial on the issue whether the defect "directly caused or directly contributed to cause" Garner's death, in effect, the jury instructions had already decided the matter for the jury. Because the district court abused its discretion in entering such a broad sanction, we reverse for imposition of a lesser sanction and for a new trial.

B. The Aggravating Circumstance Instruction

GM also argues that aggravating circumstance damages under Missouri law are in fact punitive damages and that it was subjected to such damages without the procedural safeguards required by *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Because we reverse on the issue of liability, we must vacate the award of damages. However, we address this issue to avoid error on retrial.[7]

Pursuant to the Missouri Supreme Court's recent decision in *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo. 1995), there is no question that Missouri's aggravating

[7] In so doing, we acknowledge the United States Supreme Court's recent decision in *BMW of North America, Inc. v. Gore*, 1996 WL 262429 (U.S. 1996) (reversing "grossly excessive" punitive damages award as violative of Fourteenth Amendment's Due Process Clause). Although that decision does not affect this analysis, the district court may wish to consider its teachings on remand.

circumstance damages are to be treated as punitive damages. The Missouri Supreme Court not only equated aggravating circumstance and punitive damages, but further stated, "at least since 1979, the damages attributed to 'aggravating circumstances' necessarily refers only to punitive damages." *Id.* at 466. In other words, Bennett did not signal a change in the law, but merely clarified the law as it had existed for quite some time in Missouri.[8] As the Bennett court stated, "because aggravating circumstance damages are punitive in nature, they may only be awarded if accompanied by the due process safeguards as articulated in Haslip." *Bennett*, 896 S.W.2d at 466. Consequently, we must examine whether the *Haslip* safeguards were met in this instance.

In *Haslip*, the United States Supreme Court held that the traditional means[9] of awarding punitive damages did not per se

[8] Consequently, we find the appellees' argument that Bennett should only be given prospective application unavailing. Even if we found that Bennett announced a new principle of law, which we do not, we would apply the Bennett decision retroactively. *See Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); *Elliot v. Kesler*, 799 S.W.2d 97, 102 (Mo. Ct. App. 1990). Under Chevron, a decision is to be given prospective application only if: (1) it established a new principle of law; (2) its retroactive application would retard its operation; and (3) its retroactive application would produce inequitable results. *Chevron*, 404 U.S. at 106-07. In this case, we find that prospective application of *Bennett* would produce inequitable results. The United States Supreme Court's decision in *Haslip*, with which the instructions in this case failed to comply, preceded, by two years, the trial of this case. *Haslip*, 499 U.S. at 1. To approve of, in hindsight, proceedings which were clearly in violation of Supreme Court precedent at the time of their occurrence, would be inequitable. Furthermore, we find, as would Missouri courts, that because Bennett clarified applicable substantive law, not merely procedural law, it should be given retroactive effect. *See Dietz v. Humphreys*, 507 S.W.2d 389, 392 (Mo. 1974); *Prayson v. Kansas City Power & Light Co.*, 847 S.W.2d 852, 854 (Mo Ct. App. 1992), *cert. denied*, 114 S. Ct. 95 (1993).

[9] "Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it

violate the Due Process Clause of the United States Constitution. 499 U.S. at 15. However, the Court cautioned that "unlimited jury discretion — or unlimited judicial discretion for that matter — in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." *Id.* at 18. The Court further stated that factfinders "must be guided by more than the defendant's net worth" in making such awards. *Id.* at 22. In *Haslip*, such guidance included: (1) jury instructions which adequately informed the jury as to the purpose of punitive damages — to punish the wrongdoer and to protect the public from similar future harms; (2) post-trial procedures in which the trial court scrutinized punitive damages awards; and (3) state supreme court review, including a comparative analysis, to ensure awards were "reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Haslip*, 499 U.S. at 19, 20, 21.

In this case, there was neither any guidance for the jury nor any restraint on its discretion in awarding punitive damages. Instead, the jury was allowed to award aggravating circumstance damages without being given a definition of what those damages entailed. This lack of guidance rendered the jury instructions unconstitutionally vague and violated GM's right to due process. *See Bennett*, 896 S.W.2d at 466.

The jury also did not apportion its damages award between compensatory and punitive damages, as required by *Bennett*. Trial Trans. at 1706. This resulted in a lump sum award of 11.3 million dollars. As GM stated in its objection to the lack of division, "the defendant under these circumstances can be punished without knowing what the punishment is since the damages are one figure." Trial Trans. at 1705-06. Because there is no way to compare the punitive and compensatory damages awards, GM has effectively been denied its right to trial court and appellate court review of the punitive damages award.

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is reasonable." *Haslip*, 499 U.S. at 15.

Therefore, the damages award was defective.

C. The Michigan Injunction

The constitutional full faith and credit principle requires that federal courts give the same faith and credit to a state court judgment as would the state court in which it was rendered. U.S. Const. Art. IV § 1; 28 U.S.C. § 1738. *See also Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 877 (1996). GM asserts that the district court violated this principle in allowing the plaintiffs to take Ronald Elwell's deposition and in allowing him to testify at trial. GM argues that the district court should instead have given full faith and credit to the Michigan injunction barring Elwell's testimony. Because the district court's decision to not extend the injunction full faith and credit involves a question of law, we review it de novo. *See In re Garner*, 56 F.3d 677, 679 (5th Cir. 1995); *Southeast Resource Recovery Facility Auth. v. Montenay Int'l Corp.*, 973 F.2d 711, 712 (9th Cir. 1992).

The district court refused to give the Michigan injunction full faith and credit because it believed: (1) a "public policy" exception to full faith and credit allowed Elwell's testimony, and (2) full faith and credit implies the *same* faith and credit; therefore, an injunction which is modifiable in Michigan is modifiable in Missouri. We first address the district court's reliance on a "public policy" exception to full faith and credit. The district court found that the Michigan injunction violated Missouri's public policy, as evidenced by Missouri's Rules of Civil Procedure, which favors full disclosure of all nonprivileged, relevant information. *See, e.g.*, Mo. R. Civ. P. 56. Because the Michigan injunction bars Elwell from testifying even as to nonprivileged information, the district court refused to extend full faith and credit to the injunction. Assuming, arguendo, that a public policy exception to the full faith and

credit command exists,[10] we conclude that the district court improperly relied on such an exception in this case because of Missouri's equally strong public policy in favor of full faith and credit.

Missouri public policy embraces the theory of full faith and credit, as evidenced by the references to it in the state's statutes. *See, e.g.*, Mo. Rev. Stat. §§ 511.760; 511.778. Missouri case law also contains numerous discussions of the importance of the full faith and credit requirement. *See, e.g., Roseberry v. Crump*, 345 S.W.2d 117, 119 (Mo. 1961); *In re Veach*, 365 Mo. 776, 287 S.W.2d 753, 759 (Mo. 1956); *Bastian v. Tuttle*, 606 S.W.2d 808, 809 (Mo. Ct. App. 1980); *Corning Truck & Radiator Serv. v. J.W.M., Inc.*, 542 S.W.2d 520, 524 (Mo. Ct. App. 1976). Under this doctrine, Missouri courts must give full faith and credit to judgments of sister state courts "unless it can be shown that there was lack of jurisdiction over the subject matter, failure to give due notice, or fraud in concoction of the judgment." *Bastian*, 606 S.W.2d at 809. No such allegations have been made in this case. It is therefore difficult to see how Missouri's public policy is any less supportive of full faith and credit than it is of full and fair discovery. Consequently, the district court incorrectly used Missouri's interest in full and fair discovery to override its interest in giving full faith and credit to a sister state's judgment.

The district court's reliance on the modification argument is also problematic. The district court found that the injunction was subject to modification in Michigan. It then held that because the injunction was modifiable in Michigan it need not be given full faith and credit in Missouri, but only the *same* faith and credit as given by the issuing state's court. U.S. Const. Art. IV § 1; 28 U.S.C. § 1738. *See also Matsushita*, 116 S. Ct. at 877.

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[10] In so doing, we acknowledge the contrary authority cited by the appellant on this issue. *See, e.g., Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990); Restatement (Second) of Conflict of Laws § 117 (1971) (sister state judgment recognized in other state regardless of the fact that bringing the original action in the recognizing state would offend that state's public policy).

However, the mere fact that an injunction remains subject to modification in one state does not render it unworthy of full faith and credit in another. *See* Restatement (Second) of Conflict of Laws § 109 (1988 revisions) (judgment entitled to full faith and credit despite fact that it remains modifiable in rendering state).

The full faith and credit clause "is not so weak that it can be evaded by mere mention" of the word "modification." *Howlett v. Rose*, 496 U.S. 356, 383 (1990). This is especially true on facts such as those presented here. First of all, although the appellees claim that the injunction may be modified by the Michigan court, they presented no evidence that they requested a modification from that court. Secondly, although it has been asked on several occasions to modify the injunction, the Michigan court has yet to do so. Thirdly, the district court found that Michigan law required a change in circumstances to warrant modification of the injunction, *see, e.g., First Protestant Reformed Church v. De Wolf*, 100 N.W.2d 254, 257 (Mich. 1960), but further found that there had been no "classical" change in circumstances between GM and Elwell in this case. Therefore, appellees have simply not presented sufficient evidence to show that the Michigan court would modify this injunction.

To avoid its finding of unchanged circumstances, the district court emphasized the importance of other interests, such as the discovery rights of litigants, of which it believed the Michigan court was unaware when it entered the injunction.[11] *Baker ex rel.*

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[11] The district court also attached some significance to the fact that the GM/Elwell settlement agreement allowed Elwell to testify, without violating its terms, when ordered to do so by a court of competent jurisdiction. The settlement agreement provides, in relevant part: It is agreed that [Elwell's] appearance and testimony, if any, at hearings on Motions to quash subpoena or at deposition or trial or other official proceeding, if the Court or other tribunal so orders, will in no way form a basis for an action in violation of the Permanent Injunction or this Agreement. Settlement Agreement at 10. This language merely shows GM's concession that some courts might fail to extend full faith and credit to the injunction.

Cress v. General Motors Corp., No. 91-0991 (W.D. Mo. June 18, 1993) (reproduced in Addendum to Appellant's Brief at 11). We find no evidence in the record to support such a statement. A stipulation in which GM expressly approved of Elwell's testimony in another case then pending was executed concurrently with the injunction. The Michigan court was, therefore, aware of the existence of at least some other parties' interests. The district court also would have assumed, as did the parties, that other similar litigation would follow; the injunction would otherwise have been unnecessary. Consequently, we find that the appellees failed to establish that the Michigan injunction was not entitled to full faith and credit.

III. CONCLUSION

Because the district court erred in entering a Rule 37 sanction that was too severe and in allowing Elwell to testify, we reverse and remand to the district court for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

AIMEE SHOEMAKER and JESSICA SHOEMAKER, By Next Friend, Amanda Embree,	)	
Plaintiffs,	)	
v.	)	No. 91-0990-CV-W-8
GENERAL MOTORS CORPORATION,	)	
Defendant.	)	
KENNETH BAKER and STEVEN BAKER, By Next Friend, Shirley Cress,	)	
Plaintiffs,	)	
v.	)	No. 91-0991-CV-W-8
GENERAL MOTORS CORPORATION,	)	
Defendant.	)	

ORDER

This matter is before the Court on plaintiffs' motion pursuant to Fed. R. Civ. P. 30(b)(9) to permit videotape recording of the

deposition of Ronald E. Elwell. Plaintiffs wish to depose Elwell as a fact witness in this case. Defendant General Motors (G.M.) objects to the deposition because of an injunction entered into by stipulation in a previous case by Circuit Court of Wayne County, Michigan. G.M. claims that the deposition may disclose attorney-client confidences, attorney work product or other confidential information, all of which it claims are protected by the Michigan injunction.

The Facts

Ronald E. Elwell was an employee of G.M. from July 1959 until July 1989. In 1971, Elwell was assigned to the Engineering Analysis Group. As a member of that group, Elwell worked with both G.M.'s legal staff and outside counsel in preparing defenses against product liability suits. Elwell concentrated in the area of fuel systems and fuel-fed fires. In the performance of his job, Elwell worked with G.M.'s lawyers in a number of ways: testifying as an expert witness, consulting with engineers on liability issues, preparing demonstrative evidence, participating in litigation strategy planning and helping to respond to discovery requests. In addition, Elwell was named, on numerous occasions, as the corporate employee who was most knowledgeable about certain topics pursuant to Fed. R. Civ. P. 30(b)(6). None of this work was specifically done in connection with the instant case.

In addition to his litigation-related duties, Elwell did research with the engineering analysis group, reviewed relevant legislation, reviewed literature on vehicle performance, and advised the advertising staff regarding product use. During his assignment to the litigation group, he dedicated his time to researching and studying about vehicular fires. He used this experience to improve the performance of existing and future G.M. products, including suggesting changes in G.M. fuel line designs.

There is no doubt that in his important role, Elwell had access

to, and participated in creating, many items involving attorney work product, attorney-client communication, or G.M. proprietary information.

Elwell served in this capacity until his relations with the company soured in 1987. He reached an agreement with G.M. whereby he would be placed on "unassigned" status with pay without maintaining a regular work schedule. He was occasionally retained as a consultant by G.M. and others whose interests were not contrary to G.M.'s. The agreement called for Elwell to continue with the "unassigned" status until July 1989, at which time he was to retire with 30 years of credited service.

When the time came for Elwell to retire in July 1989, Elwell and G.M. became involved in another disagreement, and Elwell did not complete the paperwork necessary to finalize his retirement. In June 1991, Elwell sued G.M. in the Circuit Court of Wayne County, Michigan, alleging wrongful discharge and breach of contract, and interference with business relationships. G.M. counterclaimed, alleging that Elwell had breached a fiduciary duty owed to G.M. and that he had misappropriated and wrongfully disclosed privileged and confidential information.

While Elwell's case against G.M. was pending in Michigan, he was enlisted by the plaintiffs in Mosely v. General Motors, a products liability action pending in a federal district court in Georgia. He was deposed twice and in the course of the depositions, at the instance of G.M., he produced five banker boxes full of documents, many of which were claimed to by privileged by G.M.

On November 22, 1991, the Michigan court issued a preliminary injunction against Elwell. The injunction prohibited Elwell from

> consulting or discussing with or disclosing to any person any of General Motors Corporation's trade secrets, confidential information or matters of attorney-client work product relating in any manner to the subject matter of any products liability litigation whether already filed or

filed in the future which Ronald Elwell received, had knowledge of, or was entrusted with during his employment with General Motors Corporation.

Attached to defendants suggestions in opposition as Exhibit "C." In August 1992, Elwell and General Motors settled their claims and signed a stipulation which states Elwell's consent to the entry of a permanent injunction. The permanent injunction referenced in the stipulation was entered on August 26, 1992 by the Circuit Court of Wayne County, Michigan.

The permanent injunction reads as follows:

> Upon reading and filing of General Motors Corporation's Motion for Preliminary Injunction and supporting pleadings, the transcripts of September 13, 1991 and October 29, 1991, and for all the reasons stated on the record and in the Preliminary Injunction entered on November 22, 1991, and after consideration of the Stipulation between the parties, the Court finds and Orders as follows:
>
> General Motors Corporation has met the requirements for permanent injunctive relief. Specifically, General Motors Corporation has met its burden in establishing that if Plaintiff disclosed various forms of privileged information he possesses General Motors Corporation would be irreparably harmed. Second, General Motors Corporation has established its burden of showing that its remedy at law is inadequate. Third, General Motors Corporation has established that the public interest weighs in favor of granting a permanent injunction.
>
> Therefore, IT IS HEREBY ORDERED that Ronald E. Elwell BE AND HEREBY IS, ENJOINED from: (1) consulting or discussing with or disclosing to any counsel or other attorney or person any of General Motors

> Corporation's trade secrets, confidential information or matters of attorney-client privilege or attorney-client work product relating in any manner to the subject matter of any litigation, whether already filed or filed in the future, which Ronald E. Elwell received or had knowledge of during his employment General Motors Corporation; and (2) testifying, without the prior written consent of General Motors Corporation, either upon deposition or at trial as an expert witness, or a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed or to be filed in the future, involving General Motors Corporation as an owner, seller, manufacturer and/or designer of the product(s) in issue. Provided, however, paragraph (2) of the Order shall not operate to interfere with the jurisdiction of the Court in the Georgia case referred to in the Stipulation.

Attached to defendant's suggestions in opposition as "Exhibit D."

Pursuant to the proviso of the Michigan court, Elwell proceeded to testify for the plaintiff and against G.M. in the Mosely case in Georgia. Subsequently the jury found for the plaintiff and assessed total damages, including both compensatory and punitive damages, at $105.5 million. Elwell's testimony played an important part in the Mosely case.

With this review of the background of this dispute, the Court turns to the present case. It consists of two lawsuits[1] arising out of a car crash where a Chevy Blazer was hit head on and burst into flames. The driver and adult front seat passenger of the Blazer were killed. The driver died as a result of trauma from the collision, but plaintiffs allege that the passenger survived the impact and died as a result of the fire. The children of the

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[1] The lawsuits were originally filed separately, then consolidated by this Court, and recently severed for trial.

passenger bring this wrongful death action against G.M. alleging defective fuel line design. The children of the driver are suing for defective design of the seat belt, steering wheel and steering column.

The parties agree that Elwell is an expert on G.M. fuel systems, including the design history, fuel system safety, design decision-making and subsequent alternative designs. These are the areas into which plaintiffs wish to inquire. Plaintiffs state that they do not seek information that is specific or has been the subject or has been the subject of litigation about which Elwell has conferred with G.M.'s lawyers, thus making the information subject to the attorney-client privilege, attorney work product privilege, or confidential. Rather, they say, they seek to depose Elwell as a "fact witness."

The question before the Court is two-fold: first, may the Court order the deposition of Elwell and would such an order be impermissibly in contravention of the Michigan permanent injunction; and second, if the injunction does not prevent this Court from authorizing the deposition, do the attorney-client and attorney work product privileges so infect his knowledge and therefore constrain inquiry so as to render the taking of his deposition impracticable.

Full Faith and Credit

The Court will assume for the purposes of this first part of its analysis that in the deposition sough[t] here that Elwell will not be asked to testify regarding any information that is prohibited under the part (1) of the Michigan injunction that prevents Elwell from revealing confidential information. Instead, the Court will address its inquiry to the second part of the injunction that prevents Elwell from testifying in any case brought against G.M. involving a product with which Elwell worked.

Our first analysis inquired whether the Full Faith and Credit clause of the Constitution requires this Court to be bound by the injunction of the Michigan Court.

The Full Faith and Credit clause states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other state." U.S. Constitution, Art. IV, § 1. That clause has be codified by Congress to read: "[s]uch Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738.

The Supreme Court has never held that the Full Faith and Credit Clause demands unequivocal, unquestioning recognition of every foreign jurisdiction's judgment. Instead, the Court has articulated several important caveats. First, a judgment shall only be accorded the credit, validity and effect that would be given it by the state in which it was entered. Underwriters Nat'l Ass. Co. v. North Carolina Life and Accident and Health Ins. Assoc., 102 S. Ct. 1357, 1365 (1982); 28 U.S.C. § 1738. Second, "a judgment of a court in one State is conclusive upon the merits in a court in another State only if the court in the first state had power to pass on the merits — had jurisdiction, that is, to render judgment." Id. at 1366 (citing Durfee v. Duke, 84 S. Ct. 242, 244 (1963)).

The last caveat is that, in certain circumstances, a judgment of a foreign jurisdiction need not be enforced by a the court of a sister state when the judgment is contrary to the public policy of that sister state. In Pacific Ins. Co. v. Industrial Accident Comm'n, 59 S. Ct. 629, 633 (1939), the Court stated: "[i]t has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the Full Faith and Credit Clause to enforce even the judgment of another state in contravention of its own statutes or policy." Id.

The Court finds two of these caveats applicable in this case, each of which is sufficient to preclude the application of the Full Faith and Credit clause to the Michigan injunction. The public policy exception to the Full Faith and Credit clause and the

requirement that a judgment be given the same effect and force as given in the issuing state will be addressed in turn.

The public policy exception to the Full Faith and Credit clause was used to allow Elwell to testify in Williams v. General Motors, No. CV392-037 (S.D. Ga.), a case involving a Chevy S-10 Blazer and allegations of seat belt defects. Williams represents the only written, well-supported rationale for any decision about the Elwell injunction.[2] The issue of Elwell's deposition was before the district judge there after a magistrate enforced the injunction and refused to let Mr. Elwell be deposed. The Williams court held that there is a public policy exception to the Full Faith and Credit clause as outlined in Nevada v. Hall, 440 U.S. 410, 420, 422 (1979).[3] The judge reasoned that Georgia law afforded protection to all items covered in part one of the injunction: attorney-client privilege, attorney work product, and trade secrets. However, the Court found that the second part of the injunction prevented Elwell from giving any testimony in cases against G.M. and that this prohibition was clearly outside of Georgia's narrow construction of statutory privileges. The Court held that part two of the injunction violates Georgia public policy and is of no effect in Georgia.

This Court subscribes to the reasoning of the William court. As will [be] discussed later, the Court cannot say that everything that Elwell might say is a deposition is privileged or otherwise confidential. Instead, much of what Elwell might say could be unprivileged, potentially relevant or designed to lead to the

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[2] The Williams court entered an order on March 5, 1993, that permitted the deposition of Mr. Elwell. G.M. is appealing this decision. See Notice of Appeal dated April 5, 1993, attached to defendant's suggestions in opposition as "Exhibit G."

[3] Defendant argues that Nevada v. Hall is inapplicable because it dealt with very specialized child custody laws. While defendants may be correct that Nevada v. Hall is not the best case to use as controlling authority, the Court believes that the principle as it is outlined in Pacific Insurance is of more general application.

discovery of relevant evidence, and therefore, discoverable. To prevent the disclosure of this information would be against the public policy of the State of Missouri.

Similar to the Federal jurisdiction, Missouri has abandoned the old school of ambush and surprise litigation tactics, and instead has adopted a comprehensive set of discovery rules and practices in order to make the discovery process more fair:

> The general provisions governing discovery are described in Rule 56. The purposes of discovery are to eliminate concealment and surprise, to aid litigants in determining facts prior to trial, and to provide litigants with access to proper information with which to develop their respective contentions and to present their respective sides on issues framed by the pleadings. State ex rel. Anheuser v. Nolan, 692 S.W.2d 325, 328 (Mo. Ct. App. 1985). The rules of discovery are also designed and interpreted to aid the court. Bethell v. Porter, 595 S.W.2d 369, 377 (Mo. Ct. App. 1980). Discovery is a search for facts, in testimony and in documents or other things, within the exclusive knowledge of possession of one party in anticipation of litigating a pending action in court. 27 C.J.S. Discovery § 1.

J.B.C. v. S.H.C., 719 S.W.2d 866, 869 (Mo. Ct. App. 1986). Furthermore, "[c]ourts in Missouri have long recognized that the rules relating to discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits and provide a party with access to anything that is "relevant" to the proceedings and subject matter not protected by privilege. State ex rel. Plank v. Koehr, 831 S.W.2d 926, 927 (Mo. banc 1992).

Certainly this Court recognizes G.M.'s right to prevent disclosure of attorney-client, attorney work product, and confidential information, but the broad ban against testifying sought by G.M. here silences much other relevant, discoverable information. As a member of the Engineering Analysis staff,

Elwell "monitor[ed] and studie[d] the performance of General Motors' vehicles in the hands of G.M. customers, including specifically G.M. vehicles involved in collisions giving rise to products liability lawsuits." Affidavit of Maynard L. Timm, at 2, attached to defendant's suggestions as Exhibit B. While Elwell undoubtedly performed litigation-related duties, Timm's affidavit clearly shows that he had responsibilities for many other distinct roles, some of which were unrelated to litigation. In those roles, it is probable that Elwell was involved in researching and improving the safety performance of vehicles. To prevent this information from being disclosed simply because Elwell also worked with lawyers is a fatally overbroad application of the Michigan injunction.

By not allowing Elwell to speak about his knowledge of G.M. products amounts to concealments of relevant evidence. An injunction that prevents the full and flair discovery of nonprivileged information held by a former employee is against Missouri's policies favoring broad discovery.

The public interest would be severely compromised if injunctions of this sort were entered as a matter of course. After reviewing the settlement agreement between Elwell and G.M. that was provided to the Court in camera, the Court believes that Elwell's cooperation with the injunction was bought for an undisclosed sum of money as one of the terms of the settlement of his claims against G.M. The agreement supplied to the Court states that "[t]he parties agree to execute the attached Stipulation and to enter the attached Order Dismissing Plaintiff's Complaint and Granting Permanent Injunction." Settlement Agreement, at 9. The same is stated in the Stipulation entered into between the parties in settlement of Elwell's claims. Stipulation, at ¶ 29.

The Court's perception of those agreements is that G.M. bought Elwell's silence on any matters that could be damaging to G.M.'s interest. Under the injunction, G.M. has not only prevented Elwell from speaking on his own behalf, but no one else may find out what he knows, effectively blockading a litigant's search for the truth and for redress. While G.M. is free

to pay Elwell for his voluntary silence, this Court holds that G.M. may not pay Elwell to keep others from finding out what he knows.

The ultimate effect of allowing such an arrangement is that a company could do all its safety testing and research under the guise of the litigation department. That would cloak all such information and all research employees with the protective shield of attorney-client and attorney work product privileges. Invocation of that privilege would then shut off all discovery of the company's knowledge of the safety of its products or its efforts to improve them. Such a system promotes secrecy and concealment and is clearly contradictory to the current policies of candor and full and fair discovery.

The public policy exception is not the only reason the Michigan injunction should not be followed in this case. This Court is not required to give full unbounded effect to an injunction entered by a court in a foreign jurisdiction. Rather, the court need only give it the credit, validity and effect that it would receive in the state in which it was entered. Underwriters Nat'l Ass. Co. v. North Carolina Life and Accident and Health Ins. Assoc., 102 S. Ct. 1357, 1365 (1982); 28 U.S.C. § 1738. The Court, therefore, turns to Michigan law to determine the finality which is accorded to a permanent injunction. "A continuing decree of injunction directed to events to come is subject always to adaption as events may shape the need." Elliot v. A.J. Smith Contracting Co., 100 N.W.2d 254, 257 (Mich. 1960) (quoting United States v. Swift & Co., 52 S. Ct. 460, 462). The power to modify an injunction does not depend on a specific court rule; rather, it is inherent in the Court's equity powers. Wayne Creamery v. Suyak, 158 N.W.2d 825, 831 & n.14 (Mich. Ct. App. 1968).

The Court finds that current events do "shape the need" to modify this injunction. The Michigan Court's injunction addressed the need to prevent Elwell from disclosing confidential information. However, from what the Court knows of Elwell's testimony in the Moseley case, it is clear that the overbroad

injunction has prevented the disclosure of not only privileged information, but much discoverable information as well. Unlike a traditional injunction situation, this injunction established not only the rights of the parties before the Michigan Court where the case in which it was entered was pending (i.e. Elwell, G.M. and engineer Bill Chicowski), but, if defendant were to prevail here, forever defined the rights of innocent third parties who have a keen interest in the information which Elwell holds.

The Court admits that there is no classical "change in circumstances" between the parties. Instead, the change that merits a revisiting of the injunction is the fact that other parties, not before the ordering court, have presented interests that were not known to the Michigan court at the time the injunction was entered. In this sense, there is a change in circumstances that requires that the injunction be revisited to determine whether justice requires a modification in the injunction's terms.

Michigan case law suggests that the rights of third parties under injunctions are important interests to be weighed by the courts, especially in the context of covenants not to compete:

> The overbreadth of an injunction also affects customers by denying them the opportunity to deal with defendants. The rights of innocent third parties should not be sacrificed in formulating a remedy, especially since the plaintiff's right to relief is based on the fiduciary relationship between the employer and employee. Although the plaintiff's trade secrets should be protected, innocent third parties, to the extent possible, should be left unaffected by the dispute between the former employer and the former employee.

Hayes-Albion v. Kuberski, 364 N.W.2d 609, 617 (Mich. 1984). This opinion by the Michigan Supreme Court supports the conclusion that this Court has a duty in this circumstance to consider the rights of third parties under a previously-entered injunction. The Court finds that the Elwell injunction severely

affects innocent third parties and their ability to conduct full and fair discovery in their efforts to seek compensation for injury allegedly caused by G.M.'s defective product. Therefore, this Court is not bound by the Full Faith and Credit clause and may revisit and modify the Michigan injunction to address third parties' needs.

Defendant argues that the Michigan Court has been given the chance to reevaluate the effect of its injunction, but three times has refused to re-open the permanent injunction. One was a motion by Elwell himself to clarify the induction, one was a motion to clarify by the Detroit News, and the third was a motion to intervene by NBC.[4] See defendant's attached exhibits H, I, J.

The actions of the Michigan Court may be relevant to the finality of the injunction, and whether rights of third parties have been considered. However, the injunction has never been challenged in the Michigan Court by a third party requesting discovery. In any case, this Court finds that circumstances have changed sufficiently to allow the injunction to be reconsidered under Michigan Law.

Since the Court finds that the conditions are appropriate to modify the injunction under Michigan law, this Court need not give full faith and credit to the injunction beyond what credit is afforded in Michigan. Therefore, this Court may revisit the terms of the injunction as it applies in this case.

The Court finds that the portion of the injunction that prevents Elwell from testifying about matters other than attorney client privilege, attorney work product and confidential information is not entitled to full faith and credit and will not be given effect in this Court.

Attorney Client and Attorney Work Product Privileges

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[4] The motions by NBC and the newspaper were not motions to receive discovery in other lawsuits.

While the Court has decided that the Michigan Injunction does not prevent the taking of Mr. Elwell's deposition, defendant contends that Elwell cannot testify without revealing privileged information, and therefore, the Court should not allow the deposition.

The Court's analysis of this contention begins with an examination of the law of privilege. Under Federal Rule of Evidence 501, all questions of privilege in a diversity action are to be decided according to state law, while claims of attorney work product are handled according to federal law. See, e.g., Airheart v. Chicago & N.W. Transp. Co., 128 F.R.D. 669, 670 (D.S.D. 1989). Missouri has codified an attorney-client privilege in V.A.M.S. § 491.060(3) (West Supp. 1992). That privilege protects testimony of an attorney "concerning any communication made to him by his client in that relation, or his advice thereon . . . " Id. That protection applies to: "1) Information transmitted by a voluntary act of disclosure; 2) between a client and his lawyer; 3) in confidence; 4) by a means which, so far as a client is aware, discloses the information to no third parties other than those reasonably necessary for the transmission of the information or for the accomplishment of the purposes for which it is to be transmitted." State v. Longo, 789 S.W.2d 812, 815 (Mo. App. 1990), citing State ex rel. Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 384 (Mo. banc 1978). Corporations enjoy an attorney-client privilege for communications between employees and in-house counsel. See Upjohn Co. v. United States, 449 U.S. 383, 396-97 (1980).[5]

This Court must apply the attorney-client privilege that is provided by Missouri law. In State ex rel. Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 383 (Mo. banc 1978), the Missouri Supreme Court rejected the narrow view of the attorney-client

[5] The Supreme Court did not establish a formal test for determining which communications between employees qualify. They instead advocated a case-by-case approach. Upjohn, 449 U.S. at 396.

privilege as proposed by Wigmore[6] in favor of a very broad privilege. The Court adopted a broader view that is intended to include much more than just the advice of the lawyer:

> When a client goes to an attorney and asks him to represent him on a claim which he believes he has against someone or which is being asserted against him, even if he as yet has no knowledge or information about the claim, subsequent communications by the attorney to the client should be privileged. Some of the advice given by the attorney may be based on information obtained from sources other than the client. Some of what the attorney says will not actually be advice as to a course of conduct to be followed. Part may be an analysis of what is known to date of the situation. Part may be a discussion of additional avenues to be pursued. Part may be keeping the client advised of things done or opinions formed to date. All of these communications, not just the advice, are essential elements of attorney-client consultation. All should be protected."

State ex Rel. Great Am. Ins. Co. v. Smith, 574 S.W.2d 379, 384-85 (Mo. banc 1978). The rule also applies broadly to communications from the client to the attorney. Id. at 384.

G.M. also asserts the attorney work product privilege as to

[6] At one time, the Missouri Supreme Court followed the Wigmore approach:

> It would protect the confidentiality of all of what the client says to the lawyer but would not protect all of what the lawyer says to the client. Of the lawyer's statements to his client, it would protect only (1) advice by the attorney concerning a communication to him by his client, (2) anything the lawyer said which could be an admission of his client, or (3) anything said by the lawyer that would lead to inferences concerning the tenor of what the client had said to him.

Elwell's communications. As noted above, the work product rule is created under federal law. It is now codified in Fed. R. Civ. P. 26(b)(3):

> [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering the discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

This codified version of the attorney work product privilege is limited to the discovery of "documents and other tangible things," and therefore is inapplicable to the case at hand. See, e.g., Baise v. Alewel's, Inc., 99 F.R.D. 95, 96 (W.D. Mo. 1983). However, defendant still contends that the thoughts and impressions of Elwell constitute attorney work product. This Court has noted before that:

> The courts have consistently held that the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the persons from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.

Id. (quoting 8 C. Wright & A. Miller, Federal Practice and Procedure § 2023, at 194 (1970)).

The sole issue before the Court at this time is whether Elwell is competent to give deposition testimony, given the nature of his relationship with the G.M. legal department. While the overall issue presents many ripe topics for discussion and analysis, the Court need only determine that there are matters about which Elwell may be deposed without disclosing privileged information.

In the Michigan Injunction, Elwell was granted an exemption from the ban on his testifying against G.M. so that he could render his testimony in the Moseley case, which was then pending. The Court views that exemption an admission by G.M. that it is possible for Elwell to testify without impermissibly divulging privileged information even as defined by G.M.. This is especially relevant because, as the Court understands it, Elwell testified for long stretches at a time without drawing an objection from G.M.. Furthermore, anything testified to in the Moseley case that might have been privileged has ceased to be so now that it has been made public. Based on this analysis alone, the Court finds that it is possible for Elwell to be deposed without necessarily revealing privileged information.

Furthermore, the Court notes that Elwell has testified either in Court or by deposition on numerous occasions in the past as [a] witness for G.M. or as a 30(b)(6) designated employee. Elwell gave approximately 60 depositions, and testified about 25 times concerning 1973-1987 pick-up trucks, nearly all of which involved post-collision fuel-fed fires. See Moseley v. G.M. Deposition, at p. 114, attached to plaintiff's motion as Exhibit E. Obviously, anything contained in that testimony is fair game.

The Court also notes that the claims of attorney work product are undermined substantially by the fact that plaintiffs do not seek documents or other tangible things. To the extent that plaintiffs seek facts from Elwell and information that is not written down, the work product doctrine is not an available avenue of objection. A party may not hide facts simply because

they are discovered in anticipation of litigation. See Baise v. Alewel's, Inc., supra. Specific applications of the privilege will be addressed at the deposition as it is taken pursuant to the rules laid down in this Order.

The Court finds G.M.'s argument that Elwell should be silenced to be a form of an abuse of the attorney client privilege by using it as a dual-edged sword. Elwell was employed to learn about the design, safety and performance of G.M. products so that he could assist the litigation department and assist in product development. When G.M. found it convenient, Elwell would put on his hat as an engineer and serve as the 30(b)(6) employee who was most knowledgeable about certain issues. He would then supply the plaintiff in a particular suit with the information G.M. wished to provide. However, now that Elwell is no longer a G.M. employee, G.M. seeks to put the toothpaste back in the tube by raising the attorney client privilege. Elwell, formerly the engineer witness, now becomes the untouchable legal assistant. This Court will not allow G.M. to use the attorney client privilege as a shield to protect its research into the safety and design of its automobiles in this manner.

Defendant cites AMC v. Huffstutler, 575 N.E.2d 116 (Ohio 1991) as authority for the propriety of enjoining an inhouse engineer from testifying. While the case is remarkably similar to this one, there is a major factual and legal distinction: the engineer in Huffstatler was also an attorney and represented AMC as counsel in many cases. The Ohio Supreme Court upheld an injunction that prevented the lawyer from testifying against AMC primarily on the basis that a lawyer gives up certain first amendment protections when he agrees to represent a client and be bound by the rules of professional conduct. Such is not the case with a non-lawyer, such as Elwell. The Court is not persuaded that Elwell cannot open his mouth without divulging privileged material. While the Court does believe that Elwell does in fact possess some information that should not be disclosed, that is a matter that goes to the scope of the deposition, not the decision of whether to allow it at all.

Defendants have also brought to the Court's attention three cases in which Elwell has not been allowed to testify. None of these cases compels this Court to follow their lead.

In Pippin v. G.M., No. 91-3401-CV-S-4 (W.D. Mo.), which is currently pending before Judge Russell G. Clark of this division, the judge addressed the issue during an informal discovery conference. Even though the issue was not formally briefed and was not even a preannounced subject of the conference, defense counsel raised the issue of plaintiff's intended deposition of Mr. Elwell. Judge Clark informally indicated that he would not allow Elwell to be deposed. There is no written memorialization of the matter.

In Harris v. General Motors, Case No. 111342 (Ca. Sup. Ct), the Court refused to allow Elwell to testify based on the Michigan injunction. The Court did not provide detailed reasons for the order (the order seems to be a proposed order submitted by G.M. and signed by the judge). Plaintiffs supply an affidavit by Elwell's attorney, Courtney Morgan, which states that Elwell was excluded from the Harris case because he had previously been retained by G.M. as a consultant on the Harris case, and had even been named as an expert for G.M., but the designation was later withdrawn.

Finally, Elwell's deposition was prevented by the Court in Carpenter v. General Motors, No. 91-CI-9034 (Bath Circuit Court, Kentucky). That Court ruled without further comment that the Michigan injunction should be entitled to full faith and credit.

None of these cases contains a full and critical analysis of the real issues of this case. Therefore, this Court is not inclined to follow their lead based on speculation about the reasoning they used or the facts that were before them.

Rule 11

While the overall quality of advocacy in this case and on this matter in particular has been of very high caliber, several

arguments and facts advanced by the parties in support of or in opposition to this motion have passed the bounds of permissible zealous advocacy into the shady realm of disinformation or deliberate deception. The Court finds the parties' characterizations of the Koval v. G.M. orders to border on violations of Rule 11.

Plaintiffs, in their initial motion, stated only that Mr. Elwell's deposition was taken in Koval and that the deposition was under a protective order. Plaintiffs then attached the text of the journal entry by Judge Anthony Calabrese which overruled G.M.'s motion to quash the subpoena for Elwell's deposition and ordered that the deposition proceed. Entry attached to plaintiffs' motion as Exhibit "H."

The Court was then shocked to read in defendant's suggestions in opposition that Judge Calabrese vacated the very order on which plaintiffs had relied. Given plaintiffs' in-depth knowledge of the situation and history of Ronald E. Elwell, the Court finds it nearly inconceivable that plaintiffs were unaware of the subsequent order vacating the authority which they had presented to the Court on this very delicate matter.

The second order referred to by G.M. is dated October 5, 1992, barely one month after Judge Calabrese ordered that the deposition proceed and three weeks after the deposition took place. The order, signed by Judge Robert M. Lawther, states:

> UPON consideration of General Motor's Motion for Reconsideration or, in the alternative, Motion to Strike and Seal in the September 15, 1992 deposition of Ronald Elwell, and after having had an opportunity to observe and review the testimony of Mr. Elwell at that deposition it is hereby ORDERED AND DECREED that:
>
> 1. The Orders denying General Motor's initial Motion for Protective Order seeking to quash the subpoena are vacated.
>
> 2. The [deposition] testimony of Ronald Elwell on September 15, 1992 is stricken.

Attached to defendant's suggestions in opposition as Exhibit "H." The Order also provides that all persons are to "refrain from disclosing the substance of the deposition testimony to any other person," return any written documents that relate to the testimony and notify General Motors of any persons to whom information relating to the deposition was disclosed. Id.

The order, and G.M.'s characterization of the order in their suggestions in opposition, suggest that the order was vacated by the judge on the merits of G.M.'s arguments and that the new order was designed by the judge to be consistent with the Michigan injunction.

The Court was surprised once again to read in plaintiff's reply that Judge Lawther's order is not what it seems. Plaintiffs attached an affidavit made by the plaintiff's attorney in the Koval case that casts real doubt on the propriety of defendant's suggestions. Attached to plaintiffs' reply as Exhibit "D."

The attorney stated that after G.M.'s motion to quash was denied by Judge Calabrese, G.M. appealed and filed a motion for a stay or induction pending appeal. Judge Calabrese issued a stay until September 15 to allow the Court of Appeals to take up the issue on an expedited basis or issue their own injunction. Judge Calabrese's injunction expired on September 15, 1992 and the deposition proceeded under the supervision of Judge Lawther and under a non-dissemination protective order issued by him. The deposition was not concluded on that day and was continued until October 1, 1992.

On October 5, 1992, according to the attorney, the case was settled and G.M., as a condition of the settlement, required the plaintiff to agree that the order permitting the deposition of Elwell be vacated and that all copies of the deposition be returned to the Court.

G.M. would have the Court believe, whether explicitly or by implicit argument, that the deposition order was vacated on its merits because the judge re-evaluated the law or facts. Instead, this affidavit demonstrates that the order was vacated only upon joint motion and pursuant to a settlement agreement. The

deposition order was vacated was that G.M. wanted to erase any official record that Mr. Elwell was permitted to testify. That G.M. now relies on the "Order" to support its position that a Court has sided with them is highly questionable.

The main difficulty the Court has with the conduct surrounding the Koyal orders is deciding whose conduct was more deceptive. The Court is confident that plaintiffs' obvious access to the Court files in the Koyal case would have revealed the facially unfavorable October 5, 1992 order. The Court is equally confident that defendant knew of the precise nature of the October 5, 1992 order. Neither party was candid with this Court. Missouri Supreme Court Rule 3.3 requires candor toward the tribunal — that includes refraining from misleading legal argument. The argument in this case is dangerously close to running afoul of both Rule 11 and the Missouri rules of professional conduct.

Conclusion

In Koyal, the judge offered G.M. the option of taking the deposition in camera and holding the deposition under seal until the Court could review G.M.'s objections as to attorney-client privilege, attorney work product and other confidential information. This Court will allow this deposition under the same protections. The deposition will proceed under the supervision of a magistrate judge. The Court expects that ground rules about areas of privilege will be established before the deposition, either by agreement or by the Court, and that all individual claims of privilege will be addressed as they arise and every effort will be made to maintain the confidentiality of privileged information.

Furthermore, insofar as plaintiffs' motion seeks permission to make a videotape recording of the deposition, that permission is granted.

Finally, on June 17, 1993, G.M. filed a motion for a protective order to cancel the deposition on Ronald E. Elwell that

is scheduled for June 23, 1993. The Court has reviewed the motion and supporting documents and finds that the deposition should proceed. However, the Court will afford a measure of protection to G.M. by preventing the widespread dissemination of Elwell's deposition. The deposition and its contents shall not be made available either in fact or in substance to any person or entity, other than the following persons: the parties to this lawsuit; their attorneys; and any witnesses for whom Elwell's testimony is necessary to prepare for trial.

Accordingly it is

ORDERED that plaintiffs' motion to take the deposition of Ronald Elwell is GRANTED. It is further

ORDERED that plaintiffs' motion to videotape record the deposition is GRANTED. It is

ORDERED that defendant's motion for protective order is DENIED.

JOSEPH E. STEVENS, JR., CHIEF JUDGE
UNITED STATES DISTRICT COURT

Dated June 18, 1993

(2)

No. 96-653

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court below erred when, in remanding this case for a new trial on several other grounds, it also ruled that one witness would be precluded from testifying at the retrial because the Full Faith and Credit Clause would require the trial court to honor the binding terms of an injunction issued by another court in another proceeding.

LIST OF PARTIES

Pursuant to Supreme Court Rule 29.1, the Court is advised that respondent has no parent companies or subsidiaries that are not wholly owned.

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No. 96-653

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent General Motors Corporation submits this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.[1] This case does involve an important question of federal law under the Full Faith and Credit Clause that is of increasing significance to the administration of justice throughout the country. Nonetheless, because that important issue is not squarely presented by the ruling below, because this case was correctly decided, and because the case has been

[1] By letter dated November 21, 1996, pursuant to S. Ct. R. 30.4, the Clerk of this Court granted General Motors an extension of time "to and including December 23, 1996" within which to file this response.

remanded for retrial on several grounds, it does not merit review at this time.

COUNTERSTATEMENT OF THE CASE

1. This case involves tort claims that stem from an automobile accident. On February 23, 1990, Doris McElwain tried to pass a UPS truck on Highway 63 in Missouri, and her Trans-Am slammed head on into a Chevy S-10 Blazer driven by Gerald Shoemaker. After the collision, a fire started in the engine compartment of the Blazer. Beverly Garner, Mr. Shoemaker's front-seat passenger, was killed in the accident.

Ms. Garner's children -- Kenneth and Steven Baker -- brought this action, sounding in strict products liability, against General Motors, which manufactured the Blazer, in Missouri state court. The case was later removed to federal court. Plaintiffs claimed that the Blazer was defective in that its electric fuel pump allegedly continued to pump fuel to the engine after impact; that the fuel started the fire in the engine compartment; and that the fire, rather than the impact, caused Ms. Garner's death. General Motors vigorously denies that the fuel pump was faulty or that it caused the fire, and has defended on the ground that Ms. Garner died as a result of collision impact injuries. Plaintiffs sought compensatory damages for wrongful death as well as damages for "aggravating circumstances" (*i.e.*, punitive damages) under Missouri law.

2. The case was never tried on the merits. Rather, the District Court entered an extraordinary default sanction against General Motors for its alleged failure to locate, on a timely basis, certain documents that were, at best, tangentially relevant to the issues to be determined at the trial. The triple-barrel default sanction instruction took away from the jury: (i) whether the fuel pump in the Chevy Blazer was defective;

and (ii) whether that defect caused the post-accident fire. The instruction also (iii) effectively directed the jury to impose the equivalent of punitive damages on General Motors. The District Court entered this far-reaching sanctions order even though it never found that General Motors had violated the specific terms of its discovery orders, wilfully or otherwise, and despite the fact that General Motors had taken extraordinary steps to comply with a barrage of last-minute discovery requests by the plaintiffs, including the production of more than 20,000 documents in the four months leading up to the trial date -- without the plaintiffs filing even a single motion for an order compelling discovery.

With the pivotal issues of defect and causation thus predetermined, the abbreviated trial of the few remaining issues began shortly thereafter. Plaintiffs' witnesses testified that, although there were no signs of consciousness from anyone in the car after the collision, Ms. Garner would have lived but for the fire in the engine compartment. Plaintiffs also presented expert witnesses who testified that gasoline fueled the post-collision fire. General Motors' witnesses testified that Ms. Garner could not have been wearing her seatbelt and likely died from the impact of the collision. General Motors' witnesses also testified that an electrical malfunction could not have caused the fire, and that the fuel lines would not have been compromised in the impact.

During closing argument, plaintiffs' counsel relied on the District Court's instruction that "GM had been aware of that defect and hazard for many years," imposed as part of its default sanction, to urge the jury to award a large verdict that included substantial punitive damages. These efforts were aided by the jury instructions that the District Court gave about the imposition of "aggravating circumstances" or punitive damages under Missouri law, which the Court of Appeals ultimately found to be unconstitutional. So instructed, the jury returned a verdict against General Motors for $11.3 million.

3. One of the plaintiffs' witnesses at the abbreviated trial was Ronald Elwell, a disgruntled former employee of General Motors. Elwell worked for many years as an integral member of the in-house litigation team whose primary function was to assist General Motors' lawyers in the defense of products liability litigation. As an in-house litigation consultant, Elwell was necessarily and regularly afforded access both to General Motors' proprietary information and to its privileged attorney-client communications and work product. In 1987, after numerous disagreements with his supervisors over his pay and lack of promotions, Elwell requested and obtained an early retirement package, which allowed him to seek outside employment as an expert litigation witness, provided that he did not breach his continuing fiduciary duties to General Motors.

In 1991, Elwell was deposed in a Georgia products liability case brought against General Motors. At about the same time, Elwell sued General Motors in Michigan state court, based on dissatisfaction with the terms of his severance package. When Elwell was deposed for a second time in the Georgia case, he gave testimony over General Motors' objection that wrongfully disclosed both the work product of General Motors' attorneys and privileged attorney-client information. Elwell also produced at the deposition five boxes of documents that he had misappropriated from General Motors, many of which contained privileged attorney-client communications, attorney work product and confidential trade secret information.

To prevent any further violations of its attorney-client and work-product privileges, General Motors counterclaimed in Elwell's Michigan lawsuit and sought to enjoin him from further divulging any of General Motors' privileged information. After a full adversary hearing in which both sides presented testimony and argument, the Michigan court granted a preliminary injunction prohibiting Elwell from disclosing to any person any of General Motors' trade secrets or confidential

information, or any matters protected by General Motors' attorney-client or work-product privileges. The Michigan court also found that Elwell posed an immediate and continuing danger to General Motors' legal privileges.

After the issuance of the preliminary injunction, General Motors and Elwell resolved the employment dispute and entered into a number of binding stipulations, including one in which Elwell acknowledged that his previous close working relationship with General Motors' legal staff and outside lawyers makes it extremely difficult for him to determine whether his knowledge with respect to General Motors comes from attorney-client and work-product communications or from nonprivileged sources. Based on this stipulation and the factual findings made at the earlier evidentiary hearing about Elwell's wrongful disclosures of privileged information, the Michigan court ordered permanent injunctive relief barring Elwell from testifying, by deposition or at trial, without General Motors' consent in any case that involves a General Motors product, other than the Georgia case in which he had already testified.

Disregarding the binding terms of the Michigan injunction, the plaintiffs in this case moved for an order permitting them to depose Elwell. General Motors opposed this motion, primarily on the ground that the District Court must honor the Michigan injunction under the Full Faith and Credit Clause of the Constitution, U.S. CONST. art. IV, § 1, and its implementing legislation, 28 U.S.C. § 1738. The District Court, however, held that the Michigan injunction did not bar Elwell's testimony for two reasons: (1) it violates Missouri public policy embodied in the discovery rules followed by the state courts; and (2) it is subject to modification by a Michigan court and therefore is not binding on any other court (even though the issuing court in Michigan has denied motions by five separate parties -- *including by Elwell himself* -- to vacate or modify the injunction, and another Michigan court has denied a motion filed by a similar products-liability plaintiff that sought to

undermine the effects of this injunction).

4. The principal focus of this case in the Eighth Circuit Court of Appeals was the validity and consequences of the extraordinary sanction imposed on General Motors by the District Court. General Motors contended that the sanction was improper for a number of reasons, and in any event the dramatic breadth of the sanction could not be justified on these facts. The Court of Appeals ultimately agreed that the sanction was not justified on the facts of this case, and therefore reversed and remanded this case "for imposition of a lesser sanction and for a new trial." Pet. App. 10a.

In addition, the Court of Appeals proceeded to clear up two other points "to avoid error on retrial." Pet. App. 10a. First, it held that the jury instructions on punitive damages were unconstitutionally vague and denied General Motors' right to due process and that the procedures used in arriving at those awards had effectively denied General Motors its right "to trial court and appellate court review of the punitive damages award." *Id.* at 12a.

Second, the Court of Appeals held that the District Court was obliged to give full faith and credit to the Michigan injunction barring Elwell's testimony, and had erred by failing to do so. On this issue, the Court of Appeals noted that even assuming, *arguendo*, that any "public policy" exception exists to the full faith and credit principle as applied to judgments, Pet. App. 14a n.10, any Missouri policy in favor of open-ended discovery and disclosure is outweighed by the countervailing Missouri policy in honoring the overriding dictates of full faith and credit, *id.* at 13a-14a. Moreover, the Court of Appeals held that the controlling command of full faith and credit cannot be evaded merely because an injunction may be subject to modification by the issuing court, particularly where the complaining party has not sought modification from the issuing court and that court has expressly declined to grant such

modification in previous instances. *Id.* at 14a-16a.

REASONS FOR DENYING THE WRIT

This case does involve an important issue of federal law under the Full Faith and Credit Clause that is of increasing significance to the administration of justice throughout the country. Petitioners also correctly note that there is disagreement on this issue among the lower federal and state courts of last resort. Nonetheless, because this important issue is not squarely presented by the ruling below, because this case was correctly decided, and because the case has been remanded for retrial on several grounds, the issue framed in the petition for certiorari does not merit review at this time.

1. The Court of Appeals correctly decided the issue presented in this case under the Full Faith and Credit Clause. It began from the established principle that the dictate of full faith and credit requires all American courts to honor the binding terms of an injunction entered by a particular state court. Framed in terms of the posture of this case, therefore, the Court of Appeals held that the "constitutional full faith and credit principle requires that federal courts give the same faith and credit to a state court judgment as would the state court in which it was rendered. U.S. Const. Art. IV § 1; 28 U.S.C. § 1738. *See also Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 877 (1996)." Pet. App. 13a.

Proceeding from these correct statements of general principles, the Court of Appeals considered and rejected the two grounds that had been relied on by the District Court in its ruling that refused to give full faith and credit to the Michigan injunction: (i) that a "public policy" exception to full faith and credit under Missouri law in favor of full disclosure of information in the discovery process allowed Elwell to testify in disregard of the terms of the Michigan injunction; and (ii) that because the terms of the Michigan injunction are

subject to modification by the issuing court in certain limited circumstances, they are likewise open to modification by any other court on any basis as it may see fit.

On the first issue, the Court of Appeals proceeded by assuming, *arguendo*, that "a public policy exception to the full faith and credit command exists" with respect to judgments. In fact, that premise is incorrect, and the court registered its "acknowledge[ment of] the contrary authority cited by [General Motors] on this issue. *See, e.g., Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990); *Restatement (Second) of Conflict of Laws* § 117 (1971) (sister state judgment recognized in other state regardless of the fact that bringing the original action in the recognizing state would offend that state's public policy)." Pet. App. 14a n.10. Indeed, those contrary authorities are dispositive of this issue; in *Howlett*, this Court expressly reiterated that the "full faith and credit clause *requires* a state court to take jurisdiction of an action to enforce a judgment recovered in another state, *although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy*." 496 U.S. at 382 n.26 (emphasis added); *see also Morris v. Jones*, 329 U.S. 545, 550-551 (1947). Indeed, this controlling principle can be traced back at least as far as the Court's decision in *Fauntleroy v. Lum*, 210 U.S. 230 (1908). This longstanding rule is subject only to two minor exceptions, neither relevant here: full faith and credit principles do not apply to: (i) judgments based on penal laws, *see Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888); or (ii) judgments involving the disposition of land, *see Olmsted v. Olmsted*, 216 U.S. 386 (1910).

Some confusion has arisen on this point from time to time because this Court *has* recognized a "public policy" exception to application of another State's *statutory law* as a matter of determining the appropriate choice-of-law rules to govern the claims raised in individual cases. That situation, however, has been clearly distinguished from the situation involving

enforcement of *final judicial orders*, which are and must be binding throughout the nation. *See, e.g., Titus v. Wallick*, 306 U.S. 282, 291 (1939); *see also Nevada v. Hall*, 440 U.S. 410 (1979). It has been recognized that the binding nature of final judicial orders is essential if the Full Faith and Credit Clause is to fulfill the purpose designated by the Framers of the Constitution, which is "to transform the several States from independent sovereignties into a single, unified Nation." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 322 (1981) (Stevens, J., concurring).

Nonetheless, the Court of Appeals in this case did not rest on this basis because it identified an alternative ground for its decision on this point -- that even if any such "public policy" exception *did* exist, it could never dictate that a Missouri court should ignore the dictates of a Michigan injunction because any such alleged "public policy" would be offset or outweighed by the equally fundamental public policy embodied in Missouri law of honoring full faith and credit principles. Pet. App. 13a-14a. Because Missouri law (like the law in every other State, which reflects controlling federal statutory and constitutional law) "embraces the theory of full faith and credit," it is "difficult to see how Missouri's public policy is any less supportive of full faith and credit than it is of full and fair discovery" or any other supposed public policy that could be alleged to conflict with it. *Id.* at 14a. Thus, it was error for the District Court to override the command of full faith and credit in favor of the alleged public policy favoring full discovery or any similar public policy. *Id.* Although the Court of Appeals thus reached this conclusion by a somewhat different route than was urged by General Motors -- one that relied in part on its assessment of the public policies embodied in Missouri law -- its analysis certainly led it to the correct result, as a matter of controlling federal law, both in this case and in any similar case.

On the second issue, concerning whether the Michigan

injunction is subject to modification, the Court of Appeals explained that "the mere fact that an injunction remains subject to modification in one state does not render it unworthy of full faith and credit in another," for "the full faith and credit clause 'is not so weak that it can be evaded by mere mention' of the word 'modification.'" Pet. App. 15a (quoting *Howlett*, 496 U.S. at 383). Instead, the Court of Appeals made three points that, taken as a whole, were found to be dispositive.

First, the plaintiffs have the undoubted right and could avail themselves of the opportunity to seek a modification of the Michigan injunction from the issuing court, but they have never bothered to do so. Indeed, this point completely defeats the due process arguments raised in the petition for certiorari. *See* Pet. 12-18. In this case, in particular, not only have petitioners not been deprived of their day in court on their tort claims, which they will have when this case is remanded for a new trial, but also they have not been deprived of their day in court in seeking to set aside the binding effects of the Michigan injunction, which they may pursue by raising the point in the issuing court. It simply does not violate due process for courts in other jurisdictions to honor full faith and credit principles and thus prevent the plaintiffs from making a deliberate end-run around the legitimate and co-equal authority of the Michigan court.

Second, although Michigan law authorizes the issuing court (but no other court, even another court in Michigan) to modify an injunction based on a true change in circumstances, the District Court had conceded that no such change in circumstances had obtained between General Motors and Elwell in this case. Pet. App. 15a.

Third, the Court of Appeals noted that the issuing court itself so far has declined requests made by several parties to vacate the injunction or modify its terms after giving full consideration to the issues raised by petitioners here. *Id.* at

15a-16a. Indeed, at this juncture the issuing court in Michigan has denied motions by five separate parties -- *including by Elwell himself* -- to vacate or modify the injunction. In addition, another Michigan court has denied a motion filed by a similar products-liability plaintiff that also sought to undermine the binding effects of this injunction, noting that under Michigan law only the issuing court has the authority to vacate an injunction or modify its terms.

In this situation, there is no tenable basis for holding that a different court in another jurisdiction is at liberty to change or ignore the binding terms of the Michigan injunction, unless the courts are determined to be simply free to deny full faith and credit to such judicial orders. Indeed, this Court expressly disapproved of such an approach in *Matsushita*, declaring that in applying the Full Faith and Credit Clause, federal courts "may not 'employ their own rules . . . in determining the effect of state judgments,' but must 'accept the rules chosen by the State from which the judgment is taken.'" *Matsushita*, 116 S. Ct. at 877 (quoting *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982)). Thus, the Court of Appeals correctly held that the Full Faith and Credit Clause requires enforcement of the Michigan injunction in this case. Because the court below got this issue right in its decision reversing and remanding this case for a new trial, plenary review of the issue by this Court is not necessary here.

2. Nonetheless, petitioners accurately aver that the decisions rendered by lower courts of last resort on the enforceability of the Michigan injunction under the Full Faith and Credit Clause are directly in conflict. As just explained, the Eighth Circuit has held in this case that the constitutional command of full faith and credit must be followed in this specific context.[2]

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[2] In a similar vein, the Ohio Supreme Court has held that such an injunction is proper to bar a former employee from testifying against

Petitioners have noted, however, that two other courts of last resort have reached the opposite conclusion by refusing to give binding effect to the very same Michigan injunction at issue in this case. In *Meenach v. General Motors Corp.*, 891 S.W.2d 398 (Ken. 1995), the Kentucky Supreme Court decided that a lower state court could modify the otherwise binding terms of the Michigan injunction in order to give the plaintiffs access to Elwell's testimony on facts that were not protected by any legal privilege. At the request of the plaintiffs in a products liability case brought in the United States District Court for the Eastern District of Kentucky, the Kentucky Supreme Court broadly declared that "neither the Full Faith and Credit Clause nor rules of comity require compulsory recognition of an injunction issued in another jurisdiction." *Id.* at 402. Instead, the Kentucky Supreme Court concluded that because the terms of the Michigan injunction would be subject to modification upon reconsideration by the issuing court, they could therefore be susceptible of modification by *any* court in *any* other jurisdiction upon *any* conceivable grounds as it saw fit. *Id.* at 400-01. Because almost every injunctive order is subject to subsequent modification by the issuing court in appropriate circumstances, this holding would completely undercut the core principles of full faith and credit. Rather than leaving this determination to the issuing court, as is required under Michigan law, the Kentucky Supreme Court ruled that every court can freely redetermine the supposedly binding terms of the Michigan court's order, which gives the terms of that order no controlling force whatsoever, but would allow them to be enforced selectively and inconsistently by different courts in different jurisdictions.

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his former employer because his testimony would be tainted by his long access to privileged attorney-client information during his previous legal work for the former employer, and that such an injunction can properly be enforced outside of the trial court's jurisdiction. *American Motors Corp. v. Huffstutler*, 575 N.E.2d 116, 121 (Ohio 1991).

Likewise, petitioners have noted that in *Smith v. Superior Ct.*, 49 Cal. Rptr. 2d 20 (Ct. App.), *review denied*, 1996 Cal. LEXIS 2185 (Cal. Apr. 18, 1996), the California courts similarly declined to give binding force to the terms of the Michigan injunction.[3] Again applying the nonexistent "public policy" exception to judgments, the California court complained that the Michigan injunction "violates our fundamental public policy against suppression of evidence" and thus erroneously concluded that to honor and enforce the terms of that injunction would "undermine the fundamental integrity of this state's judicial system." *Id.* at 27. This ruling, too, simply cannot be squared with the Eighth Circuit's contrary decision in this case.

It is also indisputable that the narrow issue of what binding force to give to the Michigan injunction at issue in this case has created broad disagreement among the lower trial courts in both the federal and state systems. Because the issue is not subject to immediate review on appeal unless certified by the trial court, or unless review is had by the narrow avenue of mandamus, the consequences of this disagreement for litigating parties are even greater than might otherwise be apparent from considering only those decisions rendered by lower courts of last resort.

3. Although it would appear that the general issue of whether injunctions are entitled to full faith and credit has been long settled, petitioners point to the *Restatement (Second) of Conflict of Laws* to assert that this Court "has not had occasion to determine whether full faith and credit requires a State of the

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[3] Because the California Supreme Court denied review in *Smith*, it too must be regarded as a decision of a state court of last resort for purposes of determining this Court's certiorari jurisdiction. *See, e.g., Hicks v. Feiock*, 485 U.S. 624, 628-29 (1988) (certiorari granted in case from California Court of Appeals where the California Supreme Court had denied discretionary review).

United States to enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act." *Id.* § 102, comment c.[4] And, indeed, a few state courts have held that certain very limited classes of injunctions are not entitled to be given full faith and credit by courts in other jurisdictions. *See Fuhrman v. United Am. Insurors*, 269 N.W.2d 842 (Minn. 1978); *James v. Grand Trunk W. R.R.*, 152 N.E.2d 858 (Ill.), *cert. denied*, 358 U.S. 915 (1958).

Other courts, however, have properly given full faith and credit to injunctions ordered by state courts. *See, e.g., Gouveia v. Tazbir*, 37 F.3d 295, 300-01 (7th Cir. 1994) (applying full faith and credit to "a valid, permanent injunction from an Indiana state court"); *Southeast Resource Recovery Facility Auth. v. Montenay In'tl Corp.*, 973 F.2d 711, 712-14 (9th Cir. 1992) (full faith and credit requires state court decision denying injunction and ordering compulsory arbitration to be enforced by a federal court); *Young v. McDaniel*, 664 F. Supp. 263, 265 (W.D. Ky. 1986), *aff'd*, 826 F.2d 1066 (6th Cir. 1987). And earlier this year this Court clarified one of the points raised by petitioners here, squarely holding that a state court settlement judgment was entitled to be given full faith and credit by all other courts. *See Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 116 S. Ct. 873, 878 (1996).[5]

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[4] *But see id.* § 117 ("A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its own courts on the original claim.").

[5] Petitioners' purportedly dire references to the "purchase[d] silence" of Elwell, *see* Pet. 11 & 16, are thus inappropriate in the wake of the Court's square holding in *Matsushita* that full faith and credit is to be afforded to settlement judgments. They also are particularly inappropriate in the circumstances here, where the Michigan court, based on the factual findings made after an evidentiary hearing on the matter, determined that Elwell had

4. Recent developments have suggested that this issue of full faith and credit is one of growing importance to the administration of justice throughout the country. Over the past year, an ongoing legal battle of great significance has been waged between the state courts of Kentucky and Mississippi about whether Jeffrey Wigand, a former vice-president for research and development at Brown & Williamson Tobacco Corporation, can be allowed to testify in Mississippi state court in defiance of a restraining order issued previously by a Kentucky state court. The Kentucky case is a civil suit alleging that the ex-employee lied about stealing confidential documents, misappropriated trade secrets, and breached his contract with his former employer by offering himself as an expert witness in litigation against tobacco companies. After the Mississippi court had authorized attorneys to proceed with his deposition, which did take place, the opposing attorneys then returned to the Kentucky courts to seek a contempt citation against him. *See, e.g.*, Alix M. Freedman, *The Deposition: Cigarette Defector Says CEO Lied to Congress About View of Nicotine*, WALL ST. J., Jan. 26, 1996, at A1; Robb Mandelbaum et al., *Whistle-Blowers; Brown & Williamson v. Wygand*, AM. LAW., Mar. 1996, at 115; Myron Levin, *Smoking Gun: The Unlikely Figure Who Rocked the U.S. Tobacco Industry*, L.A. TIMES, June 23, 1996, at D1. The legal issues raised by the continuing standoff between those dueling jurisdictions are the same kinds of issues that are involved in this case.

At the same time, the general issue of full faith and credit as applied to the enforceability across state lines of injunctive rulings continues to trouble the lower courts in the important areas of child custody determinations and child support enforcement. *See, e.g.*, Emily Barker, *Delivering "Baby*

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wrongfully disclosed General Motors' privileged attorney-client and work-product information and therefore granted injunctive relief against any such further misconduct before the case was later settled. *See* pages 4-5, *supra*.

Jessica" to Her Biological Parents, AM. LAW., Oct. 1993, at 32. The difficulty that courts have had in these areas continues to generate congressional scrutiny and piecemeal action. *See, e.g.*, Marianne Lavelle & Marcia Coyle, *Child Support*, NAT'L L.J., Aug. 16, 1993, at 17 (discussing status of the proposed Full Faith and Credit for Child Support Orders Act); *see also* Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A (modifying effects of general full faith and credit statute, 28 U.S.C. § 1738, in this context). Determination of the questions raised by the enforceability of the Michigan injunction at issue in this case under the Full Faith and Credit Clause would be likely to lend further clarity that is badly needed by the state and federal courts that must continue to wrestle with these issues.

Moreover, in a broader context, the issue of full faith and credit as applied to "the public Acts" and "judicial Proceedings" of each State, and Congress' power to prescribe "the Effect thereof" under the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1, is now being raised with great vigor in the context of same-sex marriages. With the recent enactment by Congress of the Defense of Marriage Act, Pub. L. No. 104-199 (Sept. 21, 1996), which legislates a federal exception to full faith and credit principles in this one specific area, the courts will soon be obliged to consider the validity and effect of that legislation as well as the threshold question of whether any antecedent "public policy" exception to judgments exists under the Full Faith and Credit Clause. *See, e.g.*, Patricia Wen, *Measure Barring Gay Marriages Seen as Vulnerable*, BOSTON GLOBE, Sept. 12, 1996, at B1. Once again, the Court's direct determination of the issues involved in this case would likely shed light on the related issues of full faith and credit that are certain to be raised by the new federal legislation.

5. Nonetheless, the important issue that petitioners have sought to frame in their petition for certiorari -- which is whether a court may properly refuse to give full faith and credit

to an injunction issued by another court, based on a supposed "public policy" exception to the enforcement of judgments -- is not squarely raised in this case. As explained previously, the Court of Appeals resolved this case without directly addressing this issue. Instead, it assumed, *arguendo*, that even if any such "public policy" exception exists to the full faith and credit principle as applied to judgments, the alleged Missouri policy in favor of open-ended discovery and disclosure is outweighed by the countervailing Missouri policy in honoring the overriding dictates of full faith and credit. Pet. App. 13a-14a & n.10. Although General Motors continues strongly to maintain the view that no such "public policy" exception does or should exist to the enforcement of judgments under the Full Faith and Credit Clause, *see, e.g., Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990); *Fauntleroy v. Lum*, 210 U.S. 230 (1908), the Court of Appeals' more limited ruling, which it premised instead on the basis of what it judged to be the nature and significance of the public policies embodied in Missouri state law, is not worthy of plenary review by this Court. In the end, therefore, the more significant full faith and credit issue that surrounds the enforceability of the Michigan injunction involved in this case is simply not implicated by the legal analysis adopted in the decision below.

6. Finally, the full faith and credit issue is presented here in an interlocutory posture. The Court of Appeals has remanded this case for a new trial on a variety of grounds, including that the District Court erred by imposing an unjustified sanction; by giving unconstitutional jury instructions on punitive damages; and by allowing Elwell to testify in contravention of the Michigan injunction. The purpose of the new trial in this case will be to present the relevant issues of Missouri tort law to the jury for resolution, freed from the taint of these errors.

In this posture, the results of the proceedings on remand could entirely eliminate any need for this Court to consider and

decide the merits of the issue raised in the petition. *See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967). On the one hand, if General Motors prevails at trial, and petitioners continue to believe that they were prejudiced by the omission of Elwell's testimony, they are free to pursue the issue further at that point, because this Court's prior denial of certiorari does not "establish the law of the case or amount to *res judicata* on the points raised" at a later stage of the same case. *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973). Armed with the more complete perspective of a completed retrial, however, it might be that petitioners would conclude either that this one procedural point was not particularly prejudicial to their case or that it is not worth pursuing in any event. On the other hand, if petitioners were to prevail in the new trial, then it is likely that they would not be able to claim any prejudice resulting from the fact that Elwell did not testify. At the very least, the new trial on remand may well clarify the true importance of this issue, which would avoid any need for this Court to resolve this issue in an interlocutory posture, where its significance to the ultimate resolution of this case rests largely on speculation.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 1996

No. 96-653

(2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

In recognizing both the great significance of the question presented and the existence of a conflict among the lower courts, respondent has effectively conceded the desirability of granting the petition for a writ of certiorari. The purpose of this reply, therefore, is simply to clarify several matters that are incorrectly set forth, or relied upon, in respondent's brief in opposition and to show that there is no barrier to the granting of the writ in this important case.

1. The question presented is ripe for consideration by this Court. General Motors ("GM") disputes whether the Full Faith and Credit issue was squarely presented below. Brief in Opposition ("Opp.") at 7, 17. Yet GM cannot and does not deny that the Eighth Circuit rested its decision to prohibit Elwell from testifying *exclusively* on the Full Faith and Credit principle. Appendix to the Petition for Writ of Certiorari ("App.") 13a-16a. Hence, the issue would be properly before this Court regardless of how the parties argued it. *See, e.g.*, *Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965 (1995); *United States v. Williams*, 504 U.S. 36, 41 (1992).

In fact, the Full Faith and Credit question was extensively argued in both the district court and the Eighth Circuit. At trial, GM raised the Full Faith and Credit obligation as a reason to exclude the Elwell testimony. The district court analyzed GM's argument at length and rejected it, in part because it would improperly "define[] the rights of innocent third parties who have a keen interest in the information which Elwell holds." App. 28a. GM renewed its objection in the Eighth Circuit. Petitioners countered it both by noting that petitioners were not parties to the Michigan state court proceeding and by calling the court of appeals' attention to the decisions of other jurisdictions. Petition for Certiorari ("Pet.") at 9.

2. The procedural posture of the case does not prevent review. GM also argues that review is unwarranted because the

case has been remanded for retrial. Opp. at 17-18. The Eighth Circuit's decision, however, is final with respect to the Elwell testimony. Nothing in the pending proceedings will affect the Eighth Circuit's ruling on that issue. Indeed, were the plaintiffs to prevail at retrial, the Full Faith and Credit issue might be essentially unreviewable — so that an erroneous construction of federal law would be left in place as governing precedent in the Eighth Circuit. Where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Robert L. Stern, *et al.*, SUPREME COURT PRACTICE § 4.18, at 196 (7th ed. 1993) (citing cases).

3. No privilege issue prevents review. GM suggests that the Elwell injunction is needed to prevent violations of its attorney-client and work-product privileges. Opp. at 4-5. If there were any privilege barrier to all or part of Elwell's testimony (and we believe there is not), the matter would be one for determination for the federal trial court in the first instance. The question for this Court is whether the Full Faith and Credit principle *precludes* such consideration because of a state-court judgment to which petitioners had no connection.

In any event, the injunction is much broader than any concern about privilege might warrant. Pet. at 6. The prohibition on Elwell's testimony in the instant case is a blanket one. It is not narrowly tailored to protect GM's privileges. As the district court noted, petitioners committed at trial not to seek any privileged information from Elwell. App. 22a. In fact, Elwell's testimony in *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty., Ga.), confirms the district court's finding that it would be possible for Elwell to testify without disclosing any privileged material. Pet. at 5 n.2; App. 33a.

4. GM's arguments on the merits of the case are wrong.

a. GM's extensive discussion of the "public policy"

exception to the Full Faith and Credit Clause (Opp. at 7-10) misses the point. The basic question presented is whether the Full Faith and Credit obligation precludes petitioners from calling Elwell as a witness even though they had no connection to the prior state proceeding. Only if this Court were to agree with the court of appeals that the Full Faith and Credit principle has any applicability at all would this Court even need to reach the further questions developed in the petition[1] or the "public policy" issue addressed by GM.

b. GM argues that petitioners have the option of appearing before the Michigan court to seek modification of the injunction. Opp. at 10. Far from curing the due process violation, this argument confirms it. In contending that petitioners (residents of the State of Missouri) have an obligation to seek modification of the order in a Michigan state court, GM in effect admits that, in its view, petitioners *are* governed by the Michigan injunction. If petitioners do nothing, GM asserts, they are barred from introducing Elwell's testimony in court. Yet due process commands that petitioners, as non-parties to the Michigan proceeding, may *not* be bound by the judgment there. Pet. at 12-15. It is no answer to say that the Michigan court could modify its injunction if requested to do so by the petitioners; a non-party could always ask any court to reconsider or modify a prior decision, yet that cannot justify binding the non-party to the decision. Further, GM itself all but concedes that it would be futile for petitioners to ask the Michigan court to modify its order. Opp. at 5-6, 11.

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[1] These questions include whether and to what extent the Full Faith and Credit obligation applies to injunctive decrees (a question on which there is uncertainty, as respondent appears to recognize, Opp. at 13-14), and whether the Full Faith and Credit obligation must yield in this context to other overriding principles (such as the federal interest in obtaining every man's evidence in a federal proceeding and the principle of *Donovan v. City of Dallas*, 377 U.S. 408 (1964)) — issues whose importance GM does not contest.

c. GM's surprising reliance on *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996) (*see* Opp. at 14), is not only unwarranted; it *underscores* the need for granting the petition. *Matsushita* constituted an application (in the context of a consent settlement) of the recognized principle that, when the due process requirements of *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985), are met (including notice and adequate representation), the absent members of a class will be bound by a judgment because they are treated as parties. By contrast, in this case petitioners were not parties or privies in the Michigan proceeding.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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Counsel for Petitioners

January 2, 1997

No. 96-653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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May 23, 1997

PETITION FOR CERTIORARI FILED OCT. 22, 1996
CERTIORARI GRANTED MAR. 24, 1997

58 pp

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Note: The decision of the Court of Appeals under review is contained in the appendix to the petition for writ of certiorari at 2a-16a. The decision of the District Court addressing the Full Faith and Credit issue is contained in the appendix to the petition for writ of certiorari at 17a-39a.

RELEVANT DISTRICT COURT DOCKET ENTRIES

U.S. District Court
Western District of Missouri (Kansas City)

CIVIL DOCKET FOR CASE #: 91-CV-991

Baker, et al v. General Motors Corpo — Filed 11/06/91
Assigned to: Judge Joseph E. Stevens, Jr. — Jury demand:Plaintiff
Demand: $50,000 — Nature of Suit: 365
Lead Docket: None — Jurisdiction: Diversity
Dkt # in Cir Crt Jackson City is: CV91-24986

Cause: 28:1446 Petition for Removal- Personal Injury

11/6/91	1	Notice of Removal from Jackson County Circuit Court, Case Number: CV91-024986 - w/JS-44c. (pt) [Entry date 11/12/91]
11/14/91	4	ANSWER by defendant General Motors Corpo (jd) [Entry date 11/18/91]
3/31/93	41	MOTION by plaintiff to permit videotape depo of Ronald E. Elwell (kmc)
3/31/93	42	Suggestions by plaintiff in support of motion to permit videotape depo of Ronald E. Elwell [41-1] (kmc)
4/16/93	51	MOTION by defendant General Motors Corpo to exceed page limitation of suggs requirement (jg2)
4/16/93	52	Suggestions by defendant General Motors Corpo in opposition to motion to permit videotape depo of Ronald E. Elwell [41-1] (jg2)
4/29/93	59	Reply suggestions by plaintiff to motion to permit

videotape depo of Ronald E. Elwell [41-1] (dh) [Entry date 05/03/93]

5/14/93 67 Reply by defendant to plas' rply to sugg in opp to plas' mt to permit the depo of Ronald E. Elwell (kmc)

6/14/93 76 CERTIFICATE by plaintiff of service of Ntc to take Videotaped Deposition of Ronald Elwell (no date) (dh)

6/18/93 83 ORDER by Judge Joseph E. Stevens Jr. granting pla's motion to permit videotape depo of Ronald E. Elwell [41-1] granting pla's motion to take the videotape record the depo; denying dft's motion for protective order [80-1] (cc: all counsel) (gk) [Entry date 06/21/93] [Edit date 06/21/93]

6/18/93 84 Suggestions by plaintiffs' in opposition to dft GMC's motion f/proto & anticipated motion to stay Ronald Elwell's depo pending an appeal (gk) [Entry date 06/22/93]

6/23/93 86 MEMORANDUM by plaintiffs Re: Ronald Elwell deposition (gk)

6/23/93 90 Motion/Order for pro hac vice on behalf of Ronald Elwell by Jeffrey T. Meyers Receipt #: 6661 in the amount of $25.00 (gk) [Entry date 06/24/93]

6/25/93 91 REMARK: received from 8th Circuit that this matter is before the Court on petitioner GMC's Emergency Mt for Stay of Dist Court's order of 6/18/93 permitting a deposition to occur as scheduled on 6/23/93. After careful

consideration, the Court hereby denies petitioner's emergency mt for stay (dh) [Entry date 06/30/93]

7/2/93 94 CERTIFICATE by plaintiffs of service of Ntc to take videotaped depo of Ronald Elwell (gk) [Entry date 07/07/93]

7/23/93 109 MOTION by defendant General Motors Corpo in limine to exclude the "Ivey Document" (rs)

7/30/93 129 Suggestions by plaintiffs in opposition to motion in limine to exclude the "Ivey Document" [109-1] (kmc)

8/6/93 151 CERTIFICATE of transmission of depositions of Ronald Elwell taken on 7/23/93 on behalf of plaintiffs; Costs: $1070.00; Ronald Elwell taken 6/23/93 on behalf of plas; Costs: 1740.25; Ronald Elwell, taken on 7/22/93 on behalf of plas;

8/9/93 152 MOTION by defendant in limine to exclude or limit trial testimony of Ronald Elwell (dh)

8/9/93 153 MOTION by defendant for leave to file mt in limine out of time as to testimony of Ronald Elwell (dh)

8/20/93 175 MINUTE ENTRY: All parties and the jury again appear. Court instructs the jury. Closing arguments made by respective counsel. Court retires to deliberate, returning with a verdict in favor of plaintiffs and against defendant and assessing plaintiffs' damages at $11,300,000.00 Jury polled. Trial exhibits returned to respective counsel (gk) [Entry date 08/25/93]

8/20/93 177 Verdict: on the claim of plaintiffs Kenneth Baker & Steven Baker, by next friend Melissa Thomas, for the death of Beverly Sue Garner, against GMC, we, the undersigned jurors, find in favor of: Plaintiffs Kenneth Baker & Steven Baker, by next friend Melissa Thomas (gk) [Entry date 08/25/93]

11/8/94 194 CLERK'S JUDGMENT Entered on: 11/8/94 Jury verdict and Decision by Court; that pursuant to a hrg held 8/9/93 on pla's mt for Rules 37 sanctions adn the Court's order of 11/7/94, jgm is entered for plas and against dft on the issue of defectiveness in the design of the 1985 Chevrolet S-10 Blazer; that pursuant to the jury's verdict of 8/20/93 on plas' clm for the death of Beverly Sue Garner, jgm is entered for plas and against dft General Mtrs Corporation in the amt of $11,300,000.00 (cc: All Counsel) (kmc)

2/10/95 205 ORDER by Judge Joseph E. Stevens Jr. denying dft General Mtr's motion for judgment as a matter of law [196-1], denying motion for new trial [196-2], denying motion for remittitur [196-3], denying motion for new trial on the issue of damages [196-4] (cc: all counsel) (kmc) [Entry date 02/13/95]

3/7/95 206 NOTICE OF APPEAL by defendant General Motors Corpo from Dist. Court decision [205-1] Filed 2/10/95 Entered 2/13/95 Paid $ 105.00 Rct. # 83250 (kp) [Entry date 03/09/95]

RELEVANT COURT OF APPEALS DOCKET ENTRIES

U.S. Court of Appeals for the Eighth Circuit

Court of Appeals Docket #: 95-1604 Filed: 3/13//95
Kenneth Lee Baker, et al v. General Motors Corp., et al
civil - private - none
Appeal from: U.S. DISTRICT COURT, WESTERN MISSOURI

3/13/95 Civil Case Docketed. (dkm)

3/13/95 CERTIFIED copies notice of appeal, docket entries, 11/8/94 judgment, 2/10/95 order. [95-1604] [547149] (dkm)

10/6/95 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker FOR CAL. [95-1604] [626697] (sjo) [Entry date 10/10/95]

1/8/96 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker. PUT ON BENCH ON HEARING DAY. [95-1604] [658531] (sjo)

1/17/96 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker TO COURT. [95-1604] [662502] (sjo)

4/24/96 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker. TO COURT. [95-1604] [701368] (sjo)

4/30/96 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker TO COURT. [95-1604] [703903] (sjo) [Entry date

05/01/96]

5/13/96 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker TO COURT. [95-1604] [709257] (sjo)

5/23/96 ERRATA sheet received for 28(j) citation filed by Appellees Kenneth Lee Baker, Appellees Steven Robert Baker 4/30/96, history # 703903. [95-1604] TO COURT. (sjo)

6/6/96 28(j) citation received and filed from Appellees Kenneth Lee Baker, Appellees Steven Robert Baker TO COURT. [95-1604] [718297] (sjo)

6/14/96 THE COURT: C.A. Beam, Morris S. Arnold, Donald D. Alsop. OPINION FILED by C.A. Beam PUBLISHED. [95-1604] [721990] (ema)

6/14/96 JUDGMENT: C.A. Beam, Morris S. Arnold, Donald D. Alsop: The Judgment of the lower court is REVERSED and REMANDED in accordance with the opinion. [95-1604] [721998] (ema)

6/26/96 PETITION for REHEARING with suggestions for rehearing en banc. Filed by Appellees Kenneth Lee Baker, Appellees Steven Robert Baker, w/service 6/26/96. TO COURT. [95-1604] (lcd) [Entry date 06/27/96]

7/17/96 MEMORANDUM IN SUPPORT regarding petition for Rehearing with suggestion for rehearing en banc filed by Kenneth Lee Baker, Steven Robert Baker]726940-1]. Memo Filed by Appellees Kenneth Lee Baker, Appellees Steven Robert Baker TO COURT. [95-1604] [734589] (lcd) [Entry date 07/18/96]

7/19/96 SUPPLEMENTAL MEMORANDUM IN SUPPORT filed (Order from U.S. D.C. of South Carolina) regarding petition for Rehearing with suggestion for rehearing en banc filed by Kenneth Lee Baker, Steven Robert Baker [726940-1] [735510]. TO COURT. [95-1604] (lcd) [Entry date 07/22/96]

7/24/96 JUDGE ORDER: denying petition for Rehearing with suggestion for rehearing en banc [726940-1] filed by Kenneth Lee Baker, Steven Robert Baker. Petition for panel Rehearing is also denied. Judge McMillian and Judge Loken took no part in the consideration or decision of this case. [95-1604] [736769] (lcd) [Edit date 07/26/96]

8/6/96 MANDATE ISSUED [95-1604] (lcd)

10/31/96 U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 10.25.96. Supreme Ct. Case No.: 96-653 [95-1604] [779517] (lcd) [Entry date 11/14/96]

2/18/97 U.S. Supreme Court letter received requesting the certified record of proceedings in the U.S. Court of Appeals for the 8th Circuit. [95-1604] (lcd) [Entry date 02/20/96]

2/20/96 Clerk letter sent requesting district court to transmit records to Supreme Court. [95-1604] (lcd)

2/20/97 Certified record of proceedings in the U.S. Court of Appeals for the 8th Circuit sent the U.S. Supreme Court. [95-1604] (lcd)

2/20/97 DOCKET NOTE: The Supreme Court was called on 2/20/97 regarding the pending motion for cert. Please

note that although the SC has requested the records in this case, cert has not yet been granted. [95-1604] (lcd)

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

Ronald Elwell
Plaintiff(s)

CASE NO: 91 115 946 NZ
HON: Cynthia Diane Stephens

-V-

General Motors Corp.
Defendant(s)
_____/

GRANTING IN PART, DENYING PART
INJUNCTIVE RELIEF

After the filing of papers and oral argument the Court for reasons more fully set forth on the record on September 13, 1991 and October 29, 1991 rules as follows:

THE COURT FINDS THAT GENERAL MOTOR'S REQUEST FOR PRELIMINARY INJUNCTION IS GRANTED IN PART AND DENIED IN PART.

Mr. Elwell and his agents servants employees and attorneys and those in active concert or in participation with them who receive actual notice of this order by personal services or otherwise are enjoined from consulting or discussing with or disclosing to any person any of General Motors Corporation's trade secrets confidential information or matters of attorney-client work product relating in any manner to the subject matter of any products liability litigation whether already filed or filed in the future which Ronald Elwell received, had knowledge of, or was entrusted with during his employments with General

Motors Corporation.

However, this Order does not modify any present or past Order of the Superior Court of Georgia in the case of Mosley -v- General Motors. This Court does not preclude compliance with the Orders of the Court in Mosley either directly or by inference. Production of materials in compliance with an Order of the Court in Mosley is not a violation of this injunction.

This injunction is granted because General Motors met its burden of proving that:

a. If the relief requested was not given General Motors could suffer irreparable injury.

b. There is no adequate remedy at law.

c. Public policy weighs in favor of the issuance of the injunction.

d. There is a likelihood of success on the merits of the claim filed.

The other relief requested by General Motors in Denied because General Motors failed to meet its burden under the Court Rule.

Nov 22, 1991 /s/ Judge Cynthia Diane Stephens
DATE JUDGE CYNTHIA DIANE STEPHENS

CDS/jh
112291

[True copy stamp]
/s/James R. Killeen
Deputy Clerk

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

RONALD ELWELL,

Plaintiff,

vs.

GENERAL MOTORS CORPORATION,
a Delaware Corporation,
and WILLIAM CICHOWSKI,

Defendants.
_____/

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Charles C. DeWitt, Jr. (P26636)
Attorney for Defendants
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_____/

STIPULATION

It is hereby stipulated by Plaintiff and Defendant General Motors Corporation as follows:

1. Ronald E. Elwell ("Elwell") began his employment with General Motors Corporation ("GM") on July 27, 1959.

2. On June 1, 1971 Elwell was transferred and assigned to the Engineering Analysis Group of the GM Engineering Staff located at the GM Technical Center in Warren, Michigan.

3. At all times during Elwell's employment with GM, he reported to the Ternstedt Division, Fisher Body Division or Engineering Staff Administrators as a Technical/Engineering employee.

4. From 1971 to 1989, one of Elwell's many design analysis engineering responsibilities was to assist employees of GM's Legal Staff and outside counsel in preparing responses to discovery requests and in the defense of GM's product litigation matters.

5. During the last eighteen years of his employment with GM, Elwell was: (1) at the request of GM Legal Staff members, provided confidential and non-confidential technical product information by employees of GM, and/or its outside counsel, which generally constituted proprietary information and/or trade secrets of GM; and (2) a party to many attorney-client and work product communications, both orally and in writing. As a party to these attorney-client communications, Elwell became aware of and had access to files and materials containing confidential and privileged information and work product of members of GM's Legal Staff and outside counsel.

6. During the course of his employment with GM, Elwell was utilized as an internal GM consulting expert for GM's Legal Staff and outside retained counsel in their anticipation of and/or in connection with product liability litigation. He also translated complicated technical information for attorneys or their non-technical employees at their request and participated in

discussions in which trial strategy was discussed. Elwell also testified as a fact witness and/or technical expert for GM, either by way of discovery depositions or at trial, approximately 80 times.

7. The aforesaid trade secrets, confidential information and matters of attorney-client privilege and work product are valuable assets of GM. The disclosure of confidential, non-privileged information or trade secrets to the public, or to competitors of GM could result in the loss of competitive advantages to GM. Disclosure of attorney-client or work product to litigation adversaries, or to the public, would result in the loss of said privileges and, thus, irreparably harm GM.

8. Because of the working relationship with GM's Legal Staff and outside counsel, depending upon the subject matter, it is extremely difficult for Elwell to determine whether his knowledge with respect to GM only comes from attorney-client and work product communications or from non-privileged communications.

9. On February 20, 1987, Elwell was placed on "Unassigned" status. Pursuant to the terms of the Agreement, Elwell was to be on "Unassigned" status for 28 months, effective April 1, 1987. Elwell agreed that at the conclusion of the 28 months (i.e., July 31, 1989), he would voluntarily retire from GM with 30 years of credited service.

10. The Agreement allowed Elwell to pursue outside business opportunities while on "Unassigned" status. Specifically, the parties agreed that Elwell would be utilized for consulting services in products liability litigation for GM and possibly others (so long as he did not act contrary to the interests of GM).

11. Pursuant to the terms of the Agreement, GM agreed that Elwell would not be required to report to regular daily work for

GM. Further, GM agreed to: (1) pay Elwell $4,440.47 per month during the 28 months that he was to be on "Unassigned" status; (2) credit the 28 months of "Unassigned" status to Elwell's overall length of service with GM; (3) continue Elwell's insurance coverages during his "Unassigned" status; and (4) provide Elwell with a retirement pension as provided by GM's early retirement policies.

12. Commencing on April 1, 1987, Elwell went on "Unassigned" status, and GM paid Elwell monthly in accordance with the Agreement.

13. Subsequent to April 1, 1987, Elwell was retained as an expert in various litigation matters by GM and others in the automotive industry.

14. After July 31, 1989, GM considered Elwell retired under the terms of the Agreement.

15. Prior to, as well as subsequent to August 1, 1989, Elwell refused to complete the necessary documents to process his retirement because Elwell believed GM failed to perform as provided.

16. Between August of 1989 and May of 1991, Elwell and GM attempted to reach a renegotiated Agreement. Despite such attempts, the parties did not reach a new Agreement.

17. On February 19, 1991, Elwell was noticed for deposition by counsel for the plaintiffs in a case pending in Georgia.

18. Subsequent to receiving the Elwell deposition notice in the Georgia case, GM's outside counsel held a deposition preparation meeting with Elwell. At this meeting, Elwell was advised that because of his employment dispute with GM that he should seek his own counsel. GM's outside counsel then

received a letter from Elwell's attorney.

19. On or about April 30, 1991, GM's outside counsel in the Georgia case met with Elwell's counsel to discuss the scope of Elwell's deposition. Among other things, the attorneys discussed GM's concern over the possibility that, given the nature of Elwell's work, Elwell might: (1) disclose confidential information belonging to GM; (2) disclose work product of counsel or other representatives of GM; and (3) disclose attorney-client privileged information belonging to GM. No agreement was reached with respect to how the parties would deal with deposition questions involving privileged information.

20. On May 3, 1991 Elwell was deposed by plaintiff's counsel in the Georgia case.

21. During his deposition, and over the objection of counsel for GM, Elwell criticized the competitive performance of a GM product.

22. On June 19, 1991, Elwell filed suit against GM in this Court. The Amended Complaint alleges that, among other things, GM: (1) discriminated against Elwell on the basis of a [illegible] handicap; (2) wrongfully discharged Elwell, without just [illegible]; (3) breached a contract to promote Elwell; and (4) interfered with Elwell's business relationships.

23. On August 8, 1991, GM filed a Counterclaim against Elwell. The Counterclaim alleges that: (1) Elwell breached the Agreement with GM; and (2) Elwell breached his fiduciary duties, and misappropriated privileged and confidential information. GM sought monetary, declaratory and injunctive relief against Elwell.

24. On August 15, 1991, Elwell was deposed for a second time in the Georgia case pursuant to a subpoena duces tecum.

During his deposition, and over the objection of counsel for GM, Elwell answered certain questions which, in the opinion of counsel for GM, disclosed work product of counsel for GM and attorney-client communications. With respect to the five bankers boxes of documents Elwell brought to the deposition pursuant to the subpoena, many contained privileged attorney-client communications, work product of counsel for GM, and confidential information.

25. Oral argument was heard on GM's preliminary injunction motion on September 13, 1991, and October 29, 1991. On those dates, after reviewing the briefs submitted by the parties and portions of the contents of the five Bankers boxes, the Court (Judge Cynthia Stephens) orally granted in part, and denied in part, GM's Motion.

26. On November 22, 1991, Judge Stephens entered an Order in accordance with her earlier rulings. A copy is attached as Exhibit A.

27. Elwell acknowledges that he owes GM a fiduciary duty not to disclose its confidential information, trade secrets, attorney-client communications, or work product.

28. Elwell acknowledges that GM has no adequate remedy at law.

29. Elwell agrees to the entry of the attached Permanent Injunction which: (1) enjoins Elwell from consulting or discussing with or disclosing to any counsel or any other person or entity any GM trade secret, confidential information, or matter of attorney-client privilege or work product relating in any manner to the subject of any litigation, whether already filed or yet to be filed, which Elwell received or had knowledge of during his employment with GM; (2) enjoins Elwell from testifying without the prior written consent of GM, either at deposition or trial, as

an expert witness, or as a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed or to be filed in the future, involving GM as an owner, seller, manufacturer and/or designer of the product(s) in issue; and (3) requires all documents or other materials relating to GM and all copies thereof in the possession of Elwell, Elwell's attorney, or which have been given to others, that are of a confidential nature or which constitute or contain trade secrets, privileged information or attorney client or work product and relates to GM's business be immediately returned to GM.

30. Elwell agrees to dismiss his Complaint against GM and William Cichowski with prejudice, and without costs or attorney fees. Except as set forth in the Order Dismissing Plaintiff's Complaint and Granting Permanent Injunction, GM agrees to dismiss its counterclaim against Elwell with prejudice, and without costs or attorney fees.

GENERAL MOTORS CORPORATION

/s/ Ronald E. Elwell
Ronald E. Elwell

/s/ Charles C. DeWitt, Jr.
By: Charles C. DeWitt
Its Attorney

DYKEMA GOSSETT

/s/ Courtney E. Morgan, Jr.
Courtney E. Morgan, Jr. (P29137)
Attorney for Plaintiff

/s/ Charles C. DeWitt, Jr.
Charles C. DeWitt, Jr. (P26636)
Attorney for Defendants

CCD4449

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

RONALD ELWELL,

Plaintiff, Civil Action No. 91-115946 NZ

vs.

GENERAL MOTORS CORPORATION,
a Delaware Corporation
and WILLIAM CICHOWSKI,

Defendants.
_____/

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_____/

AFFIDAVIT OF MAYNARD L. TIMM

NOW COMES the undersigned who, first being duly sworn, deposes and says as follows:

1.

My name is Maynard L. Timm. I am currently employed as an attorney on the Legal Staff of General Motors Corporation, Detroit, Michigan.

2.

I am more than 21 years of age and make this affidavit as to matters of my personal knowledge.

3.

Ronald Elwell was employed by General Motors from July, 1959 until August, 1989, at which time he completed 30 years of credited GM service.

4.

From 1971 until April, 1987, Mr. Elwell was employed as a member of the staff of Engineering Analysis at General Motors. As part of its responsibilities, Engineering Analysis monitors and studies the performance of General Motors' vehicles in the hands of GM customers, including specifically GM vehicles involved in collisions giving rise to products liability lawsuits. A major responsibility of Engineering Analysis is to serve as an in-house litigation support staff of experts, assisting General Motors' lawyers in the technical defense of product liability litigation.

5.

Elwell was one of the GM engineers responsible for fuel system analysis and the defense of post-collision fire cases while he was a member of Engineering Analysis, with particular responsibility for the analysis and defense of pickup truck fuel systems. In this capacity he testified numerous times in deposi-

tion and at trial in defense of the safety and crashworthiness of GM pickup truck fuel systems.

6.

In his capacity as an in-house litigation expert, Elwell did the following:

- Interpreted technical information which was made available to General Motors' Legal Staff and outside counsel;

- Responded to technical inquiries from GM's counsel responsible for defending post-collision fire cases;

- Assisted GM's lawyers in responding to discovery propounded in product liability cases;

- Reviewed government studies and technical literature on fuel system design and performance so as to advise the Legal Staff and GM fuel system engineers about new developments;

- Monitored governmental rulemaking in the field of automotive safety so as to advise the Legal Staff and GM fuel system engineers on new developments, and assisted in drafting GM's responses to proposed rules;

- Consulted with GM design engineers on future products, providing engineering judgments informed by litigation experience on issues of occupant safety;

- Routinely consulted with GM lawyers on strategic issues of litigation defense;

- Recommended and developed demonstrative evidence to

be used at trial of post-collision fire cases, including laboratory testing of components and crashtesting of entire vehicles;

- Assisted GM's Legal Staff and outside counsel in identifying and retaining outside experts and met with such experts to prepare strategy in the defense of products liability cases;

- Suggested lines of testimony and cross-examination on technical matters to rebut plaintiffs' experts;

- Frequently testified, both by affidavit and in person, in pretrial discovery disputes over the breadth of plaintiffs' discovery, the proper scope of relevant engineering issues and evidence in a given case, and General Motors' entitlement to confidential treatment for internal GM documentation;

- Appeared as an expert witness on behalf of General Motors at trials of products liability cases;

- In cases where he appeared as a witness, participated in major strategy sessions with GM's lawyers during trial;

- Provided technical assessments and gave generously of his engineering judgment in settlement evaluation discussions with GM's lawyers;

- Was an integral member of GM's products liability defense team;

- As an integral member of GM's products liability defense team, Elwell had access to, participated in, and gained knowledge of confidential attorney-client privileged and attorney work product information relating to GM's

defense of litigation, including specifically post-collision fire litigation.

7.

After a number of disagreements with his supervisors, Elwell eventually requested and obtained a retirement program with General Motors, pursuant to which he was given an "unassigned" status beginning in April, 1987 until August, 1989, when he attained 30 years of credited GM service. Pursuant to this arrangement, Elwell was to retire in August, 1989. During the 28 months between April, 1987 and August, 1989, Elwell ceased all active job duties at Engineering Analysis, although he continued to be paid $4,400 per month. During this same time Elwell was free to seek outside employment as an expert consultant and witness in automotive products liability cases, so long as he did not act contrary to the interests of GM, and to retain any payment he received for such independent services.

8.

Shortly before the expiration of the "unassigned status" period, Elwell complained to General Motors about the amount of the monthly stipend that he had previously agreed to accept pursuant to his retirement program. He demanded to be paid the amount of money he would have received had he worked full-time to age 65. He also alleged that GM had not lived up to its part of the retirement agreement, claiming that GM did not include him in a list of so-called outside expert consultants. When the end of the 28-month period arrived in August, 1989, Elwell refused to execute the appropriate paperwork for retired status and threatened to sue.

9.

In 1991, in a Georgia products liability suit involving a pickup truck fire, General Motors' counsel received a request from plaintiffs for the deposition of Elwell. Although by that time Elwell was no longer employed at General Motors, as an accommodation to plaintiffs, I contacted Elwell to inquire whether he was willing to appear voluntarily for the deposition and to schedule a date. General Motors' counsel also met with Elwell to discuss the deposition and to advise him that--given the pending employment dispute and Elwell's threats of suit--GM's lawyers could not represent Elwell personally at the deposition.

10.

Thereafter, Elwell retained independent counsel, Courtney Morgan of Detroit, Michigan, to represent him at his deposition. Morgan himself had previously represented plaintiffs in two major post-collision fire cases against General Motors, Burke v. General Motors Corporation, and Lehr v. General Motors Corporation.

11.

General Motors' counsel met with Morgan prior to the deposition to discuss how to handle objections of privilege and work product which--given Elwell's services as an in-house expert witness--could be expected to arise at the deposition. Morgan refused to agree to honor any such objections by General Motors, even pending resolution by the Court of GM's claims. This necessitated a court hearing in which the Georgia court, while denying General Motors' request for a court order as premature, cautioned Morgan to be sensitive to issues of privilege and work product.

12.

I was present at the deposition of Ronald Elwell taken by plaintiffs in the case of Moseley v. General Motors Corporation on May 3, 1991. During that deposition, Elwell gave opinion testimony which was markedly different from that he had given while he was employed as an in-house expert witness at General Motors. Although Elwell in 1971 had participated in and approved the design of the pickup truck fuel system in which the fuel tanks were located outside the framerails before it was released for production; and although he had defended the safety and crashworthiness of that fuel system on a number of occasions in sworn testimony, Elwell on May 3, 1991 criticized the performance of the GM pickup truck fuel system to be inferior to that of its competitors.

13.

When General Motors' counsel attempted to establish Elwell's motive and bias by questions exploring his employment relationship with General Motors, Elwell's counsel gave a blanket instruction that the witness should not answer any such questions. This instruction necessitated that a second deposition be noticed by General Motors Corporation.

14.

On June 18, 1991, Elwell, then a Michigan resident, was personally served in Ann Arbor, Michigan with a subpoena duces tecum for that second deposition (see Appendix E to General Motors' Memorandum in Support of Preliminary Injunction). On June 19, Elwell filed an employment lawsuit against General Motors in Wayne County, Michigan. (See Appendix D to General Motors' Memorandum.)

15.

I also attended the second deposition of Ronald Elwell taken in Moseley v. General Motors Corporation, which occurred on August 13, 1991, in Albuquerque, New Mexico, where Elwell had moved after being served with the Moseley subpoena.

16.

Elwell brought with him to the deposition five banker's boxes of documents which he said he was producing in response to the subpoena duces tecum. General Motors' initial review of those documents revealed that they contained a number of privileged communications and attorney's work product materials, as well as an extensive array of internal General Motors documentation which Elwell had taken with him when he left the Corporation.

17.

Plaintiffs' counsel in the Moseley case insisted on immediate access to the documents brought by Elwell to the deposition. General Motors objected, contending that the boxes contained some material which contained privileged and work product information. Elwell's lawyer stated that GM had waived any privilege or work product protection by subpoenaing the documents from Elwell and made the documents available to the Moseley plaintiffs. Plaintiffs' counsel in Moseley refused to defer his review even until General Motors could obtain a telephone ruling from the Georgia court.

18.

A telephone conference with the Georgia court then took place. The Georgia court ruled that General Motors had a right to review the documents in advance of plaintiffs' review and to set aside any documents it believed to be privileged for an in

camera determination of privilege and/or work product. The order incorporating that ruling is attached as Appendix F to General Motors' Memorandum in Support of Preliminary Injunction.

19.

After receiving the ruling of the Georgia court that General Motors had a right of first review before plaintiffs could have access to the documents, Elwell's attorney withdrew all of the documents from review and stated that they would need to review the documents to determine which, if any, were actually responsive to the subpoena. Elwell's attorney said that Elwell would retain custody of the documents.

20.

Between the time the documents were first produced and the time Elwell withdrew them, I had an opportunity briefly to review the categories of documents contained within the boxes brought by Elwell to the deposition. While it was impossible to review individually the hundreds of individual documents in the boxes, I determined that the boxes contained a wide variety of GM documents which Elwell must have wrongfully maintained possession of when he left the corporation. Many of the files appeared unrelated to either pickup trucks or Elwell's employment dispute (the two categories of documents requested by the subpoena). More particularly, the boxes contained at least the following types of documents:

1. Correspondence with GM's Legal Staff concerning cases to which Elwell was assigned while he was at Engineering Analysis.

2. Correspondence with GM's outside counsel in cases in which Elwell was retained as a consultant.

3. Collections of notes from meetings with GM counsel about litigation.

4. Numerous lists of lawsuits and settlements involving various vehicles.

5. Numerous lists of crashtests.

6. Internal presentations on design issues and litigation issues prepared by GM engineers.

7. Internal memoranda on design issues and litigation issues prepared by GM engineers.

8. Correspondence between the GM Legal Staff and other employees of General Motors.

9. Correspondence with GM engineers about design issues raised by pending and potential litigation.

10. Photographs of GM vehicle testing.

11. Films of GM vehicle testing.

12. General Motors crashtest reports.

21.

I believe that many of the documents reflecting communications between Elwell and GM's counsel are protected by both the attorney-client privilege and the work product doctrine. Other communications between the GM Legal Staff and GM engineers other than Elwell may similarly be protected. Still other information -- not privileged -- included within the document collection is internal, confidential, proprietary design information, for which GM routinely seeks a protective order of confi-

dentiality whenever it must be produced in litigation. Elwell himself submitted a number of affidavits when he was an employee of General Motors supporting the confidentiality of such information, testifying that such information is not available outside the corporation, and seeking protective orders of confidentiality.

Neither Elwell nor any other employee was or is authorized to unilaterally remove documents from the premises of General Motors and retain them for his personal benefit and use. Such documents are General Motors' property, not the property of individual employees. While an employee at General Motors, Elwell signed an agreement to safeguard the security of GM property and product information.

Further, affiant sayeth not.

/s/ Maynard L. Timm
Maynard L. Timm

Sworn to and subscribed before
me, this 29th day of August, 1991.

/s/ [illegible]
NOTARY PUBLIC
Wayne County, Michigan

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

RONALD ELWELL,
Plaintiff,

Civil Action No. 91-115946 NZ

vs.

GENERAL MOTORS CORPORATION,
a Delaware Corporation
and WILLIAM CICHOWSKI,
Defendants.

/

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/

ORDER DISMISSING PLAINTIFF'S COMPLAINT
AND GRANTING PERMANENT INJUNCTION

At a session of said Court held in the City County Building, City of Detroit, County of Wayne, State of Michigan, on August 26, 1992.

PRESENT: Honorable Richard P. Hathaway
Wayne Circuit Court Judge

Upon reading and filing of General Motors Corporation's Motion for Preliminary Injunction and supporting pleadings, the transcripts of September 13, 1991 and October 29, 1991, and for all the reasons stated on the record and in the Preliminary Injunction entered on November 22, 1991, and after consideration of the Stipulation between the parties, the Court finds and Orders as follows:

General Motors Corporation has met the requirements for permanent injunctive relief. Specifically, General Motors Corporation has met is burden in establishing that if Plaintiff disclosed various forms of privileged information he possesses General Motors Corporation would be irreparably harmed. Second, General Motors Corporation has established its burden of showing that its remedy at law is inadequate. Third, General Motors Corporation has established that the public interest weighs in favor of granting a permanent injunction.

Therefore, IT IS HEREBY ORDERED that Ronald E. Elwell BE AND HEREBY IS, ENJOINED from: (1) consulting or discussing with or disclosing to any counsel or other attorney or person any of General Motors Corporation's trade secrets, confidential information or matters of attorney-client privilege or attorney-client work product relating in any manner to the subject matter of any litigation, whether already filed or filed in the future, which Ronald E. Elwell received or had knowledge of during his employment with General Motors Corporation; and (2) testifying, without the prior written consent of General Motors Corporation, either upon deposition or at trial, as an expert witness, or as a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed, or to be filed in the future, involving General Motors Corporation as an owner, seller, manufacturer and/or designer of the product(s) in issue. Provided, however, paragraph (2) of this Order shall not operate to interfere with the jurisdiction of the Court in the Georgia case referred to in the Stipulation.

IT IS FURTHER ORDERED that Ronald E. Elwell is required to immediately return to General Motors Corporation all documents or other materials relating to General Motors Corporation and all copies thereof in the possession of Ronald E. Elwell.

IT IS FURTHER ORDERED that Ronald E. Elwell's Complaint against General Motors Corporation and William Cichowski is hereby DISMISSED with prejudice, and without interest, costs or attorney fees.

[Stamp of Judge Richard P. Hathaway]
Hon. Richard P. Hathaway
Wayne Circuit Court Judge

[Clerk's stamp and signature, illegible]

No. 95-1604

In The United States Court of Appeals
For The Eighth Circuit

General Motors Corporation,
Appellant,

v.

Kenneth Lee Baker, et al.,
Appellees.

Brief of Appellant General Motors Corporation

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May 31, 1995

* * *

II. THE COURT VIOLATED THE FULL FAITH AND CREDIT CLAUSE BY PERMITTING RONALD ELWELL TO TESTIFY IN DISREGARD OF THE TERMS OF AN INJUNCTION ENTERED BY A MICHIGAN COURT.

General Motors is entitled to a new trial for the additional reason that the District Court erred in allowing Ronald Elwell to testify at trial, in violation of the Michigan state court injunction that prohibits him from testifying in cases involving General Motors products because he has previously wrongfully disclosed privileged information and has admitted that it is extremely difficult for him to distinguish between privileged and non-privileged information.

In this case, both before his deposition and at trial, General Motors objected to Elwell's being allowed to testify. (App. 56; Tr. 362, 372). General Motors argued that the Michigan injunction barring Elwell from testifying must be enforced by the District Court because that injunction is entitled to full faith and credit under the U.S. Constitution and 28 U.S.C. § 1738.[16]

Neither of the reasons given by the District Court -- (i) that the Michigan injunction violates Missouri public policy, or (ii) that the Michigan injunction is subject to modification by the court that issued it -- justifies denying its enforcement here.

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[16] A number of courts have considered whether this injunction is entitled to full faith and credit; those courts are split. Compare, e.g., Stephens v. General Motors, No. 303305 (Stanislaus County, Ca. May 24, 1995) (Unpublished, reproduced at Add. 43-45) (granting full faith and credit to the Michigan injunction) with Williams v. General Motors, 147 F.R.D. 270 (S.D. Ga. 1993). This case is the first appeal before a United States Court of Appeals to raise this specific issue.

A. There Is No Public Policy Exception To the Full Faith and Credit Clause for Judgments.

The District Court erred first and foremost because there is no "public policy" exception to the constitutional and statutory command of full faith and credit. The Constitution mandates that "Full Faith and Credit shall be given in each state to the public Acts, Records, and judicial Proceedings of every other State." U.S. Const., art. IV, § 1. Congress has implemented this Clause through a statute specifying that "judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. The full faith and credit command extends to all judgments, including equitable decrees such as injunctions. See, e.g., Gouveia v. Tazbir, 37 F.3d 295, 300-01 (7th Cir. 1994) (applying Full Faith and Credit Clause to "a valid, permanent injunction from an Indiana state court"). That much is apparent from the expansive wording of both the Constitution and the statute, which apply broadly to all "judicial proceedings." See also Restatement (Second) of Conflict of Laws § 201 (injunctions entitled to full faith and credit).

It has long been settled, at least since the Supreme Court's decision in Fauntleroy v. Lum, 210 U.S. 230 (1908), that judgments entered in the courts of other States are entitled to full faith and credit regardless of the contrary public policy, if any, of the forum State. As long as the state court that first renders judgment on the matter properly exercises its jurisdiction to do so, its final judgment has binding effect and must be afforded full faith and credit in the courts of other States.[17]

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[17] The Fauntleroy rule is subject to two minor exceptions, neither relevant here: full faith and credit principles do not apply to judgments based on penal laws; see Wisconsin v. Pelican Ins., 127 U.S. 265 (1888), or judgments involving the disposition of land, see Olmsted v. Olmsted, 216 U.S. 386 (1910).

Fauntleroy's rule remains controlling law. As the Restatement (Second) of Conflict of Laws explains:

> A valid judgment rendered in one State of the United States will be recognized and enforced in a sister State even though the strong public policy of the latter State would have precluded recovery in its own courts on the original claim.

Id. § 117 (emphasis added). The Supreme Court recently reiterated that there is no public policy exception to the full faith and credit due state court judgments: "The full faith and credit clause requires a state court to take jurisdiction of an action to enforce a judgment recovered in another state, although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy." Howlett v. Rose, 496 U.S. 356, 382 n.26 (1990) (emphasis added); see also Morris v. Jones, 329 U.S. 545, 550-51 (1947).[18]

B. Even If There Were A Public Policy Exception, The Michigan Injunction Violates No Applicable Public Policy.

Even if there were a "public policy" exception to the Full Faith and Credit Clause for judicial orders -- which there is not -- no public policy would defeat the injunction here.

First, the District Court held that the Michigan injunction was inconsistent with the "broad discovery" allowed by Missouri's

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[18] The Court below may have been confused because the Supreme Court has recognized a "public policy" exception to application of another State's statutory law in choice-of-law decisions. That situation, however, has been clearly distinguished from the situation involving enforcement of judicial orders, which are binding throughout the nation. See Titus v. Wallick, 306 U.S. 282, 291 (1939); see also Nevada v. Hall, 440 U.S. 410 (1979).

rules of civil procedure. (Add. 21). But Missouri's rules of civil procedure do not apply in this case -- the Federal Rules of Civil Procedure apply in federal court, even in a diversity case. Hanna v. Plumer, 380 U.S. 460 (1965).

Second, no matter which set of discovery and/or evidentiary rules one looks to (Missouri's, Michigan's, or the Federal Rules), the Michigan injunction does not violate any public policy embodied in those rules. None of those sets of rules countenances the wrongful disclosure of privileged attorney-client and work-product information by a former employee. The Michigan court found, after a full adversary hearing on General Motors' motion for a preliminary injunction, a high likelihood that General Motors would suffer irreparable harm were Elwell to continue to violate its privileges. (App. 99). Moreover, these findings, and Elwell's strong propensity further to violate his fiduciary duties, were subsequently confirmed by Elwell himself, who stipulated that, in light of his nearly twenty years assisting the Legal Staff, it was extremely difficult for him to distinguish in his own mind what he knew from privileged sources and what he knew from nonprivileged sources. (App. 79). In light of these facts, the Michigan court's conclusion that Elwell should not be allowed to testify in any more cases against General Motors, is a reasonable remedy that is entirely consistent with public policy. Indeed, when a witness has been exposed to privileged materials as has Elwell, courts frequently bar the witness from testifying (through injunctions similar to the Michigan Order). See American Motors v. Huffstutler, 575 N.E.2d 116, 119 (Ohio 1991); see also Uniroyal Goodrich v. Hudson, 873 F. Supp. 1037 (E.D. Mich. 1994); Hayworth v. Schilli Leasing, 644 N.E.2d 602 (Ind. App. 1994). And where, as here, the former employee has clearly demonstrated his propensity to divulge privileged information, an injunction against further testimony is all the more reasonable.

Third, the suggestion by the District Court that General

Motors "bought" Elwell's silence (Add. 21) by settling his underlying employment action is totally unsupported by the record. To the contrary, the Michigan court had preliminarily enjoined Elwell well before the parties settled the underlying employment action. The mere fact that the preliminary injunction was made permanent at the same time that General Motors settled Elwell's employment claims does not make the continuation of the pre-existing injunction "bought." Indeed, the suggestion that the Michigan state court would allow General Motors to buy from it an injunction reflects an unwarranted suspicion of, and lack of respect for, the Michigan state courts.

In sum, even if there were a public policy exception to the requirement of full faith and credit, which there is not, the District Court erred in ruling that the Michigan injunction violated public policy.

C. The Fact That the Injunction May Be Modified By the Issuing Court Does Not Deprive It of Full Faith and Credit.

The District Court also ruled that the Michigan injunction would not be afforded full faith and credit because it is subject to modification under Michigan law. (Add. 25). This too was error.

The mere fact that a permanent injunction remains subject to modification in the state of issuance does not deprive it of finality for purposes of the constitutional command of full faith and credit. See Restatement (Second) of Conflict of Laws § 109 (1988 Revisions) ("A court will recognize or enforce a judgment rendered in a State of the United States that remains subject to modification in the State of rendition.").

The Supreme Court has held that "'the judgment of a state court should have the same credit, validity, and effect, in every

other court of the United States, which it had in the state where it was pronounced.'" Underwriters v. North Carolina Life, 455 U.S. 691, 704 (1982) (quoting Hampton v. McConnel, 16 U.S. (3 Wheat.) 378, 379 (1818)). Under Michigan law, no Michigan trial court except the court that entered the injunction may alter it. See Mich. Civ. R. 2.613(B) (judgment may be set aside or vacated "only by the judge who entered the judgment or order, unless that judge is absent or unable to act") (emphasis added).[19]

Accordingly, under Michigan law, the Elwell injunction may not be modified other than by the court that issued it. The injunction is entitled to that same force and effect in the District Court under the Full Faith and Credit Clause and 28 U.S.C. § 1738. Therefore, the injunction cannot be modified by the District Court any more than it could be modified by a different Michigan court.

Moreover, it was particularly wrong for the District Court to attempt to modify the Michigan injunction given that the Michigan court has on three separate occasions refused to modify the injunction. (Add. 24-25). The federal-law command of full faith and credit would be a dead letter if a judgment of a state court could be modified by a federal district court in the face of the state court's repeated refusal to modify the injunction itself.[20]

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[19] This case is therefore unlike Halvey v. Halvey, 330 U.S. 610 (1947). The Florida child custody decree in Halvey was not granted full faith and credit because "custody decrees of Florida courts are ordinarily not res judicata either in Florida or elsewhere, except as to the facts before the court at the time of judgment." Id. at 613 (emphasis added).

[20] There is also no basis for modifying the injunction for the additional reason that, as the District Court conceded, there has been "no classical 'change in circumstances' between the parties" justifying modification. (Add. 23).

D. Allowing Elwell To Testify Was Highly Prejudicial.

Allowing Elwell to testify in violation of the Michigan injunction was plainly prejudicial to General Motors. Elwell provided the critical foundation testimony for the admission of the Ivey Document against General Motors -- namely, that, contrary to the testimony of Mr. Ivey (Tr. 1474-75) -- who has repeatedly stated that he created the document on his own initiative -- there was supposedly a third page indicating that the document had been circulated and discussed with General Motors' officials. (Tr. 913). Without this testimony, there was no basis at all in the record to think that anyone at General Motors ever saw the Ivey Document, much less made design decisions based upon it.

Indeed, although General Motors need not make any such showing to prevail here on its Full Faith and Credit argument, Elwell's testimony also fell squarely within the zone of disclosure of privileged information that the Michigan injunction was designed to prevent. As his testimony makes clear (Tr. 412-13), whatever Elwell knew about the existence of the purported missing distribution page of the Ivey Document he knew from his litigation support responsibilities to the General Motors Legal Staff. Indeed, Elwell testified that the reason he was given the document was because it was relevant to his "job responsibilities" (Tr. 412), which included coordinating the response to discovery requests in lawsuits involving post-collision fuel-fed fires. That is precisely the sort of work-product and attorney-client information that the Michigan injunction was intended to prevent Elwell from wrongfully disclosing.[21]

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[21] Elwell's testimony concerning the purported source of the fire (Tr. 397), which was not given as an expert but rather was based on Elwell's experience working as an adjunct for the General Motors legal staff, was also prejudicial.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

APPEAL NO. 95-1604

GENERAL MOTORS CORPORATION,
Appellant,

v.

KENNETH LEE BAKER, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

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* * *

III. THE DISTRICT COURT PROPERLY PERMITTED RONALD E. ELWELL TO TESTIFY IN THIS CASE, CONTRARY TO AN "AGREED UPON" FOREIGN JURISDICTION'S INJUNCTION INCLUDED IN A SETTLEMENT OF AN EMPLOYMENT DISPUTE BETWEEN GM AND MR. ELWELL.

A. GM GROSSLY MISREPRESENTS, EXAGGERATES, AND CONCEALS NUMEROUS CRITICAL FACTS REGARDING THE MICHIGAN INJUNCTION AND RONALD ELWELL.

1. The Injunction.

The Michigan Injunction resulted from a signed Stipulation in which Ronald Elwell "agree[d] to" entry of an Injunction (App't App. 77-84) to finalize an employment dispute settlement with GM (App't App. 98-100). The Injunction, which generally bars Elwell's testimony in cases involving GM products (App't App. 99-100), is subject to at least two exceptions. Elwell can testify if GM consents (App't App. 99), and a "secret agreement" between Elwell and GM allows a court of competent jurisdiction to order Elwell's testimony (App'ee App. 1116).

2. The "Secret Agreement".

GM has concealed from this Court the Agreement associated with the employment dispute settlement between Elwell and GM resulting in the Stipulation and Injunction. The Agreement indicates an understanding that, despite the Injunction, Elwell can always testify when allowed by a court. This Agreement came to light in Willis v. Nissan Motor Co.,

Ltd.[70], when Elwell advised the Court that he could not voluntarily testify because of the Injunction, but could testify if ordered by a court of competent jurisdiction (App'ee App. 1115). Courtney Morgan, Elwell's personal attorney in the employment dispute settlement with GM, confirmed that the Agreement permitted Elwell to testify when allowed by a court of competent jurisdiction (App'ee App. 1123-24).

In addition to concealing the existence of the Agreement from this Court, GM has never produced the Agreement to Appellees in the instant case. However, the Agreement was produced by GM to the District Court in camera, and the District Court carefully considered the Agreement before allowing Elwell's testimony (App't Add. 21) (App'ee App. 1134, 1144).

3. Numerous Courts Throughout the United States Have Allowed Ronald Elwell's Testimony Notwithstanding the Injunction.

GM states that, "[a] number of courts have considered whether this injunction is entitled to full faith and credit; those courts are split." (GM's Brief 49, fn. 16) (emphasis added). GM misrepresents the facts. In truth, at least twenty-one courts throughout the United States, including six Federal District Courts, have allowed Ronald Elwell's testimony despite the Injunction[71]. These courts make it abundantly clear that the Full Faith and Credit Clause does not allow the Michigan Injunction

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[70] Willis v. Nissan Motor Co., Ltd., United States District Court for the Northern District of Georgia, Atlanta Division, No. 1:8I7-CV-1164-JTC (App'ee App. 1114).

[71] See Shoemaker v. General Motors Corp. (App't Add. 11), Williams v. General Motors Corp. (App'ee App. 1078), and 19 additional orders attached in Appellees' Supplemental Appendix.

to bar all future testimony by Elwell concerning GM[72].

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[72] A number of courts have noted the limited affect of the Michigan Injunction in their orders allowing Elwell's testimony.

- Shaffer-Kleoppel v. General Motors Corp. A decision in the Western District of Missouri, following the Baker decision, in which the court not only reaffirmed its analysis in Baker, but also allowed "opinion testimony" (App'ee Supp. App. 10).
- Carpenter v. General Motors Corp. In its order granting a motion to depose Elwell, the court stated "We hold that full faith and credit is not applicable to the judgment of a sister state involving different parties. Petitioners are not bound by the terms of a permanent injunction entered in an action in which they were not parties, in which they did not participate, in which their interests were not represented" (App'ee Supp. App. 8-9).
- Delarosa v. General Motors Corp. In granting a motion to depose Elwell, the court noted that '[t]he judgment signed by the Wayne County Circuit Court in my opinion is not entitled to full faith and credit as intended by the United States and Texas Constitutions because (a) it attempts to resolve future discovery matters that may arise between persons who were not parties before that court in the Michigan hearing; and (b) this was not an order entered as a result of a contested or 'litigated' hearing but was an agreed order" (App'ee Supp. App. 40).
- Meenach v. General Motors Corp. The court noted that "a judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than it has in the State where rendered." The court further indicated that "[w]here, as here, the Plaintiffs have made the requisite showing under Rule 26 that Elwell has relevant information that may lead to admissible evidence at trial, we hold that the Court may modify the Michigan injunction and permit Elwell's discovery deposition and/or testimony at trial." (App'ee Supp. App. 51, 55).
- Worden v. General Motors Corp. In reaffirming a lower court order refusing to enforce the Michigan Injunction, the court indicates that Elwell's previous testimony and depositions have made certain portions of his knowledge "a

In contrast, only one final order exists denying Elwell's testimony because of the Injunction, and it is distinguishable from the

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matter of public record." (App'ee Supp. App. 35).

- Colmenares v. General Motors Corp. In denying a motion for a protective order to bar the deposition of Elwell, the court cites to the "Shoemaker v. GM" decision, noting that the District court for the Western District of Missouri "showed some sound wisdom" in allowing Elwell's testimony (App'ee Supp. App. 6).
- Roberts v. General Motors Corp. In granting a motion to depose Elwell, the court indicated that "a Michigan Court ha[s] no jurisdiction over the subject matter of what testimony a witness will, or will not, give in the State of Georgia." (App'ee Supp. App. 21).
- Ruskin v. General Motors Corp. In granting a motion to depose Elwell, the court noted that of fourteen cases seeking Elwell's deposition, courts in twelve cases rejected GM's argument that the full faith and credit clause enjoined Elwell's testimony against GM, and permitted Elwell's deposition. The court further indicated these cases "are all exactly on point, and together constitute a powerful argument to permit Elwell's deposition." Finally, the court indicated that "the Michigan injunction involves a blanket prohibition that contravenes Connecticut public policy and hence is not entitled to full faith and credit." (App'ee Supp. App. 58-61).
- Williams v. General Motors Corp. In granting a motion to depose Elwell, the court indicated that "a Georgia court may modify the Michigan court's decree without violating the Full Faith and Credit Clause." The court further indicated that "the public interest -- which must be weighed in any consideration of injunctive relief -- is not served in this instance by prohibiting Elwell from testifying in Georgia as to matters not within the scope of an attorney-client or work-product privilege ... Any interest GM might have in silencing Elwell as to unprivileged ... matters is outweighed by the public interest in full and fair discovery." (App'ee App. 1084).

instant case[73]. Contrary to GM's assertion, the courts are not "split" on this issue.

4. Ronald Elwell Has Never Wrongfully Disclosed Any Privileged GM Information.

A recurring theme in GM's Brief is that Ronald Elwell has a "propensity" to wrongfully disclose privileged GM information (App't Brief 49, 52-53). In fact, GM asserts that the injunction was entered because Elwell:

> ... previously disclosed privileged attorney-client and work-product communications and because Elwell has admitted in court that it is extremely difficult for him to distinguish between what he knows from privileged and unprivileged sources.

App't Brief 20. This claim misrepresents the basis of the Injunction[74]. GM also asserts that Elwell wrongfully disclosed privileged GM information in the case of Moseley v. General

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[73] Harris v. General Motors Corp., Superior Court of Ventura County, California, No. 111342 (App'ee App. 1070). Harris is completely distinguishable from the twenty-one cases allowing Elwell's testimony. In Harris, Elwell had consulted with GM and was named by GM as an expert witness. Thus, Elwell was part of GM's defense team. Another trial court, Stephens v. General Motors Corp., Superior Court of Stanislaus County, California, No. 303305, prohibited Elwell from testifying, however, it is on appeal.

[74] The Injunction includes no reference to previous wrongful disclosures by Elwell, and the Stipulation preceding the Injunction indicates that it is merely the "opinion of counsel for GM" that Elwell disclosed privileged GM information (App't App. 82). GM also overstates Elwell's alleged difficulty in distinguishing knowledge from privileged and unprivileged sources, as the Stipulation indicates that GM"s blanket assertion is only true "depending upon the subject matter." (App't App. 79).

Motors Corp.[75] (App't Brief 21-22). However, GM neglects to mention that the Injunction specifically indicates that any disclosure by Elwell of privileged GM information in the Moseley case was not a violation of the Injunction (App't App. 100)[76].

In short, GM makes numerous statements regarding Elwell's alleged "propensity," but fails to cite even one instance where a court has found that Elwell wrongfully disclosed privileged GM information. In fact, GM has never brought an action pursuant to the Injunction against Elwell for wrongfully disclosing privileged GM information, even though at least twenty-one courts have allowed Elwell to testify notwithstanding the Injunction.

5. Ronald Elwell Had Numerous Duties During His Employment with GM Which Were Not Litigation-Related, and GM Greatly Exaggerates Its Claims that Elwell's Knowledge is Protected by the Attorney-Client and Work-Product Privileges.

GM implies that Ronald Elwell only had litigation-related duties during his employment with GM (App't Brief 19-20). This is yet another misrepresentation by GM. During Elwell's approximately thirty years with GM, his many duties included participation in research and studies of vehicular fires and working to improve GM product performance (App'ee App. 1107-08), performing research with the Engineering Analysis Group and reviewing legislation impacting vehicles (App'ee

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[75] Moseley v. General Motors Corp., Fulton County, Georgia, No. 90V-6276.

[76] The preliminary injunction entered in Elwell's employment dispute with GM also specifically stated that any disclosure by Elwell of privileged GM information in the Moseley case was not a violation of the preliminary injunction (App't App. 96).

App. 1107), and reviewing literature on vehicle performance and advising GM advertising staff regarding product use (App'ee App. 1107). This brief list indicates Elwell had numerous non-litigation-related duties.

Moreover, GM's claims that Elwell's knowledge is protected by the attorney-client and work-product privileges are greatly exaggerated (App't Brief 19-21). The Moseley case, supra, is an excellent example. During Elwell's first deposition in the Moseley case, he testified for two days and 370 pages before GM's counsel made a single attorney-client or work-product objection, despite GM's counsel's statement on the record that she would object to any questions invading GM's attorney-client or work-product privileges (App'ee App. 1108). Also, GM's counsel in the Moseley trial made only three attorney-client objections in approximately 580 pages of Elwell testimony, none of which were sustained by the Court (App'ee App. 1108).

B. THE DISTRICT COURT CORRECTLY RULED THAT THE MICHIGAN INJUNCTION IS NOT ENTITLED TO FULL FAITH AND CREDIT IN MISSOURI BECAUSE: THE INJUNCTION IS MODIFIABLE AND CONSTITUTES A VIOLATION OF PUBLIC POLICY.

1. The Iniunction Is Not Final and Is Always Modifiable Pursuant to Michigan Law.

The entire thrust of GM's argument is that courts are required to mechanically and without question extend full faith and credit to the Injunction. In essence, GM argues that the Injunction is entitled to "fuller" faith and credit in Missouri than it would receive in Michigan. That is clearly not the law. A court in a sister state is only required to give an injunction the same credit, validity, and effect that it would receive in the state

in which it was entered. Underwriters Nat'l Assoc. Co. v. North Carolina Life & Accident & Health Insurance Assoc., 455 U.S. 691, 704 (1982).

The Supreme Court of Michigan has expressly held that, "'[A] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.'" First Protestant Reformed Church v. DeWolf, 100 N.W.2d 254, 257 (Mich. 1960) [quoting United States v. Swift & Co., 286 U.S. 106 (1932)]. Michigan Courts have also made it clear that, "an injunction is always subject to modification or dissolution if the facts merit it." Opal Lake Assoc. v. Michaywe' Limited Partnership, 209 N.W.2d 478, 485 (Mich. App. 1973). In addition, the United States Supreme Court indicated it was "established long ago that even an injunction entered by consent of the parties ... is always modifiable" and this is true even where there is no express reservation of the power to modify because:

> power there still would be by force of principles inherent in the jurisdiction of chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need ... [A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong.

Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 782 (1st Cir. 1988), cert. denied, 488 U.S. 1030 (1989).

The Injunction in the instant case is, without question, "directed to events to come", as it expressly purports to control Ronald Elwell's testimony in, "any litigation, whether already filed or filed in the future" (App't App. 99). In view of the modifiable nature of injunctions recognized by both the Supreme Court of Michigan and the United States Supreme Court, the

Injunction in the instant case would apparently be subject to modification by the Michigan Court[77]. The modifiable nature of the Injunction is further emphasized by the clause allowing GM to bypass the effect of the Injunction by consenting to Elwell's testimony (App't App. 99), and by the "secret agreement" allowing courts to order Elwell's testimony (App'ee App. 1115). Because the Injunction was clearly subject to modification by the Michigan Court, and because courts are only required to give an injunction the same credit as the state they are entered in, the District Court correctly found that the circumstances mandated the Injunction not be given full faith and credit in Missouri.

2. The Injunction Violates Missouri Public Policy.

The Michigan Injunction amounts to a blanket concealment of relevant information possessed by Ronald Elwell. Thus, the Injunction prevents the full and fair discovery of relevant, non-privileged information, and is contrary to public policy as expressed in both the Federal Rules of Civil Procedure and the Missouri Rules of Civil Procedure. The United States Supreme Court has recognized public policy limitations on the Full Faith and Credit Clause, stating that:

> [i]t has often been recognized by this Court that there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy.

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[77] GM points out that the Michigan Court has declined to modify the Injunction on three separate occasions (App't Brief 55). However, GM fails to mention that none of those occasions involved a situation where the Injunction was challenged by a third party requesting discovery (App't Add. 25).

Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 U.S. 493, 502 (1939) (emphasis added); Nevada v. Hall, 440 U.S. 410, 422 (1979). Both Federal and Missouri courts have recognized certain implicit policies in their procedure rules[78].

Appellees clearly have a right to discover non-privileged information possessed by Elwell. However, the Injunction prohibits Elwell from testifying "as a witness of any kind ... in any litigation already filed, or to be filed in the future, involving General Motors Corporation ..." (App't App. 99-100). This prevents Appellees from discovering any information possessed by Elwell, privileged or not privileged. In addition, Appellees were not parties to the proceedings resulting in the Injunction, and it is difficult to see how the Injunction could affect their rights. Because the Injunction prevents discovery of non-privileged information, in contravention of the Missouri Rules of Civil Procedure[79], the Injunction violates Missouri public policy and is not due full faith and credit.

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[78] Discovery under the Rules changed the entire concept of litigation from a cards-close-to-the-vest approach to an open-deck policy. It seeks to facilitate open and evenhanded development of the facts underlying a dispute, so that justice may be delivered on the merits and not shaped by surprise or like tactical stratagems.

American Floral Services, Inc. v. Florists' Transworld Delivery Assoc., 107 F.R.D. 258, 260 (N.D. Ill. 1985).

> [c]ourts in Missouri have long recognized that the rules relating to discovery were designed to eliminate, as far as possible, concealment and surprise in the trial of lawsuits and to provide a party with access to anything that is "relevant" to the proceedings and subject matter not protected by privilege.

State v. Koehr, 831 S.W.2d 926, 927 (Mo. 1992) (en banc).

[79] "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Mo.R.Civ.P. 56.01(b)(1).

C. THE DISTRICT COURT PROPERLY ALLOWED RONALD ELWELL TO TESTIFY REGARDING THE "IVEY DOCUMENT."

GM generally complains that it was prejudiced by Elwell's testimony regarding the "Ivey Document" (App't Brief 24). GM deceptively indicates that Elwell's testimony about the "Ivey Document" constituted disclosure of privileged information because he learned of it through his "job responsibilities." (Tr. 412). However, Elwell's "job responsibilities" included a wide variety of non-litigation-related activities. GM also repeatedly asserts that Edward Ivey created the Document on his own initiative, that Ivey never distributed the Document to anyone within GM, and that there was never a third page to the Document indicating to whom within GM it was distributed (App't Brief 24-25). GM ignores that these were all matters for the jury to determine as triers of fact. This Court has consistently held that determination of witness credibility is a matter best left to the jury. Walker v. Jackson National Life Ins. Co., 20 F.3d 923, 925 (8th Cir. 1994); Piotrowski v. Southworth Products Corp., 15 F.3d 748, 753 (8th Cir. 1994). The jury had a full opportunity to judge Ivey's credibility and weigh his testimony against Elwell's testimony[80]. The jury obviously believed Elwell's testimony, and the jury's determination should not be disturbed.

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[80] Compare Ivey's testimony (Tr. 1467-79, 1485-92) with Elwell's testimony (Tr. 398-420, 426-27).

No. 95-1604

In The
United States Court of Appeals
for the Eighth Circuit

General Motors Corporation,
Appellant,

v.

Kenneth Lee Baker, et al.,
Appellees.

Reply Brief of Appellant General Motors Corporation

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Excerpts from Reply Brief of Appellant General Motors Corporation (General Motors Corporation v. Kenneth Lee Baker, et al. (8th Cir. No. 95-1604)

II. THE MICHIGAN INJUNCTION BARRING RONALD ELWELL'S TESTIMONY IS ENTITLED TO FULL FAITH AND CREDIT.

The Michigan injunction barring Ronald Elwell from testifying is entitled to full faith and credit under the Constitution and the implementing federal statute. None of the reasons offered by appellees for denying the Michigan injunction full faith and credit is proper under the controlling decisions of the Supreme Court.

Appellees begin by making the unwarranted and inappropriate suggestion that the Michigan injunction is a "purchased" order of the court that is subject to "secret" codicils (Baker Br. 51-52).[14] Aside from the impropriety of thus impugning the integrity of the Michigan court, this claim is false. The Michigan court entered a preliminary injunction on the merits on November 22, 1991, and entered a permanent injunction, also on the merits, on August 26, 1992. (See App. 98-100). Both orders were entered based on the record evidence in that case, including evidence developed at a preliminary injunction hearing and stipulations of fact by the parties. After considering this

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[14] The so-called "secret agreement" provision trumpeted by appellees was merely a provision that Elwell subsequently bargained for, out of concern that conflicting jurisdictions might place him in an untenable position. General Motors thus agreed that if Elwell testified in a proceeding because he was ordered to do so by some other court, that action alone would not necessarily constitute a violation of the settlement agreement. This provision, however, does not and could not lessen the independent force of the Michigan injunction.

evidence, the Michigan court specifically held that "the public interest weighs in favor of granting a permanent injunction." (App. 99).

Appellees also seek to reargue issues that were presented to the Michigan court, such as the nature of Elwell's duties during his employment with General Motors and the extent to which Elwell has wrongfully disclosed privileged information about General Motors (Baker Br. 54-56). These issues were considered and determined by the Michigan court when it entered a permanent injunction, and do not undercut in any respect the constitutional requirement that full faith and credit must be given to that order.[15]

Appellees' two legal arguments were addressed in our initial brief (GM Br. 49-56), and thus only a brief reply is in order here.

First, as to the supposedly "modifiable" nature of the Michigan injunction, appellees' argument amounts to a bare claim that no judicial order granting injunctive relief should be entitled to full faith and credit. Because any injunction could theoretically be modified at some future date, no other court would be required to honor such an order if it did not wish to do so. But that is emphatically not the law. See, e.g., Gouveia, 37 F.3d at 300-01; Restatement (Second) of Conflict of Laws § 102 (injunctions are entitled to full faith and credit). And it is

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[15] See, e.g., Gouveia v. Tazbir, 37 F.3d 295, 300-01 (7th Cir. 1994) (giving full faith and credit to a permanent injunction entered by an Indiana state court). Appellees are correct that a majority of state and federal trial courts thus far have failed to give full faith and credit to the Michigan injunction. But see Stephens v. General Motors, (GM Br. 49); Harris v. General Motors, (Baker Br. 54); Smith v. General Motors, No. 454255-1 (Fresno Cty., Ca. 1995). In any event, this is the first case in which a federal appeals court has considered on appeal the proper legal analysis under the constitutional and statutory provisions.

significant that the Michigan court which issued the injunction has refused, on three separate occasions, to revisit it upon request. (Add. 24-25). Although appellees make the cursory argument that those refusals are inapposite (Baker Br. 57 n. 77), it is telling that appellees themselves have never sough modification from that court. Instead, they have preferred to press an improper collateral attack on the Michigan injunction, in utter disregard of the dictates of the Full Faith and Credit Clause.[16] But under Michigan law, which governs the issue of modification here, only the issuing court can alter its own injunction. (see GM Br. 54-55).

Second, appellees' public policy argument simply misstates the law. When a judgment is entered by a court of another State, it is entitled to full faith and credit regardless of any contrary public policy of the forum State. Fauntleroy v. Lum, 210 U.S. 230, 236-37 (1908); Howlett v. Rose, 496 U.S. 356, 382 n.26 (1990) (citing Fauntleroy).[17] Federal courts do not have license to ignore State-court judgments. Moreover, there is no basis for the public policy argument in fact, even if there were some basis for it in law. (GM Br. 52-53).[18]

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[16] The impropriety of this collateral attack is shown also by the District Court's express acknowledgment that "no classical 'change in circumstances' between the parties" justified modification. (Add. 23).

[17] The two specific exceptions to this general rule, along with the "public policy" exception to enforcement of another State's statutory law (see GM Br. 51 nn. 17 & 18), have nothing to do with this case.

[18] In our initial brief, we also explained why Elwell's testimony was prejudicial so as to require reversal on this ground (GM Br. 23-25, 55-56). Although appellees contend that Elwell's testimony was proper (Baker Br. 59-60), they do not dispute that the testimony, if improperly given, was prejudicial to General Motors in this case.

No. 96-653

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR PETITIONERS

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May 23, 1997

45 pp

QUESTION PRESENTED

As a result of a state court proceeding, General Motors (the defendant below) obtained a consent decree enjoining one Elwell from testifying against GM in products liability cases. In a federal court suit brought by petitioners against GM, the court below held that the Full Faith and Credit obligation precluded petitioners from obtaining Elwell's testimony.

The question presented is whether the court below erred in holding that petitioners, who were not parties to the state proceeding or in privity with any party, could be precluded from obtaining the witness's testimony on the basis of an obligation to give Full Faith and Credit to state court judgments.

PARTIES TO THE PROCEEDING

The petitioners in this case are Kenneth Lee Baker and Steven Robert Baker, by his next friend, Melissa Thomas.

The respondent is General Motors Corporation.

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BRIEF FOR PETITIONERS

Petitioners Kenneth Lee Baker and Steven Robert Baker, by his next friend, Melissa Thomas, seek reversal of the judgment of the United States Court of Appeals for the Eighth Circuit insofar as that court held that the Full Faith and Credit obligation required the trial court to exclude the testimony of Mr. Ronald Elwell.

OPINIONS BELOW

The decision of the Court of Appeals denying rehearing (Pet. App. 1a)[1] is reported at 1996 U.S. App. LEXIS 18387. The decision of the Court of Appeals on the merits (Pet. App. 2a-16a) is reported at 86 F.3d 811. The decision of the District Court addressing the Full Faith and Credit issue (Pet. App. 17a-39a) is unreported.

JURISDICTION

On July 25, 1996, the Court of Appeals denied the suggestion for rehearing en banc and the petition for rehearing by the panel. *See* Eighth Cir. Rule 35A(4). The petition for writ of certiorari was filed on October 22, 1996 and granted on March 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Full Faith and Credit Clause provides:

> Full Faith and Credit shall be given in every State to the public Acts, Records, and judicial Proceedings of every

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[1] References to the Appendix to the Petition for Writ of Certiorari are styled "Pet. App. _a." References to the trial transcript are styled "Tr. _."

> other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings may be proved, and the Effect thereof.

U.S. Const., Art. IV, § 1. The Full Faith and Credit statute provides in relevant part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738.

STATEMENT OF THE CASE

1. Background. This case began as a products liability action by two children whose mother, 29-year-old Beverly Garner, burned to death in an allegedly defective vehicle manufactured by respondent General Motors Corporation (GM).

On Feb. 23, 1990, Ms. Garner was a front-seat passenger in a 1985 Chevrolet S-10 Blazer when it was involved in an auto accident and caught fire. Although rescuers used three fire extinguishers underneath the hood of the Blazer, the flames kept reappearing. Tr. 558-59. Witnesses heard Ms. Garner screaming repeatedly, "It's hot in here. Please get me out!," Tr. 441-42; "Help me!," Tr. 491, 504-05, 509; and "I don't want to die this way. Please, somebody, help me out!" Tr. 472.

Ms. Garner's children, petitioners here, alleged that the Blazer was defective in that its electric fuel pump continued to pump gasoline to the engine after impact. Specifically, petitioners alleged that the fuel pump relay, designed to shut off the fuel pump when the oil pressure went to zero, was defective because it was placed in a location that made it vulnerable to

collisions. In the 1985 Blazer, the fuel pump relay was attached to the firewall and directly behind the engine block; it was in the "crush zone." Addendum to Appellees' Br. in Ct. App. at 1 (July 20, 1995). (In the 1986 Blazer model, the location of the fuel pump relay was changed to the fender well, outside the "crush zone." Appellees' Addendum in Ct. App. at 2.) Petitioners alleged that the fuel pump relay on the Blazer was damaged in the collision and allowed the fuel pump to continue pumping gasoline into the fire that killed Ms. Garner. In addition, petitioners separately alleged that the 1985 Blazer should have been equipped with an "inertia switch" to shut off the fuel pump, as GM had proposed in a 1973 patent application.

2. Initial Proceedings in the District Court. Petitioners, who are residents of the State of Missouri, filed a wrongful death products liability action in Missouri Circuit Court on Sept. 27, 1991. On Nov. 11, 1991, GM, which is a Delaware corporation with its principal place of business in Michigan, removed the case, pursuant to 28 U.S.C. § 1441, to the United States District Court for the Western District of Missouri. The district court had jurisdiction under 28 U.S.C. § 1332.

During pretrial proceedings, the district court found that "General Motors' discovery practices as a whole [have been] conducted with a complete disregard for both the letter and the spirit of the federal Rules of Civil Procedure." *Baker v. General Motors Corp.*, 159 F.R.D. 519, 520 (W.D. Mo. 1994). Accordingly, "[a]fter full hearings and considerable briefing," *id.*, the district court imposed sanctions against GM. The court ordered that it "shall be established for the purposes of this action" that

> The 1985 Chevrolet S-10 Blazer at issue in this case was defective in that General Motors placed an electric fuel pump in the fuel tank without an adequate mechanism to shut off the pump in the event of a malfunction or collision and that General Motors has been aware of this

> defect and hazard for many years. The fuel pump in the 1985 Chevrolet S-10 Blazer in this case continued to operate after the engine stopped upon impact.

159 F.R.D. at 528. The district court incorporated this language in its jury instruction. The case proceeded to trial on the issue of whether the defect in the 1985 Chevy Blazer "directly caused or directly contributed to cause" the death of Beverly Garner. Tr. 1725.

3. The Elwell Testimony. At trial, the district court permitted petitioners to introduce the testimony of Ronald Elwell, who was a GM employee for nearly 30 years beginning in 1959. Pet. App. 18a. For roughly the first 10 years of his employment with GM, Elwell's primary duties involved the development of door latches and latching mechanisms. Tr. 379. In 1969, Elwell assumed responsibility for a Reliability Program that coordinated quality inspection for products shipped to GM plants. *Id.*

In 1971, Elwell was assigned to the Engineering Analysis Group, which was responsible for providing engineering services to GM's different divisions. Elwell's work centered on fuel systems and fuel-fed fires. Pet. App. 18a. As a member of the engineering group, Elwell assessed the performance of GM vehicles in order to advise engineers who were responsible for developing and designing future vehicles. *Id.* He suggested changes in GM fuel line designs. *Id.* He conducted research and studied accidents in the field involving fires. Elwell also reviewed GM literature on vehicle performance prior to its publication, analyzed relevant legislation that had an impact on the vehicles on which he was working, and advised the advertising department on how GM products should be marketed. *Id.*

In addition, Elwell worked with both GM legal staff and outside counsel in preparing defenses to product liability suits. He testified as an expert witness, consulted with engineers on

liability issues, prepared demonstrative evidence, participated in litigation strategy planning, and helped to answer discovery requests. Pet. App. 18a. Pursuant to Fed. R. Civ. P. 30(b)(6), GM repeatedly designated Elwell as the GM employee most knowledgeable about fuel systems. Pet. App. 18a. None of this litigation-related work, however, was specifically done in connection with the instant case. *Id.*

Elwell's relationship with GM ultimately deteriorated. Elwell contended that GM had withheld vital information from him, making his prior trial testimony on GM's behalf inaccurate. GM contended that Elwell had had disagreements with his supervisors and was disgruntled over his retirement and severance package.

In 1991, Elwell retained his own attorney and testified against GM in a pending products liability case. *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga.).[2] Elwell also filed suit against GM in the Circuit Court of Wayne County, Michigan, alleging wrongful discharge and other tort and contract claims. GM filed a counterclaim against Elwell alleging breach of fiduciary duty for his disclosure of privileged and confidential information and his misappropriation of documents. GM sought a preliminary injunction and, after a brief hearing, the court enjoined Elwell from:

> consulting or discussing with or disclosing to any person any of General Motors Corporation's *trade secrets, confidential information or matters of attorney-client*

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[2] As the district court noted, Elwell's testimony in the *Moseley* case illustrates that "it is possible for Elwell to testify without impermissibly divulging privileged information even as defined by G.M." Pet. App. 33a. Although GM's counsel stated on the record in the *Moseley* case that she would object to any questions invading GM's attorney-client or work-product privileges, Elwell testified for two days (370 transcript pages) before GM's counsel made her first attorney-client or work-product objection. GM made only three such objections in the approximately 580 pages of testimony taken.

> *work product* relating in any manner to the subject matter of any products liability litigation whether already filed or filed in the future which Ronald Elwell received, had knowledge of, or was entrusted with during his employment with General Motors Corporation.

Pet. App. 19a-20a (emphasis added).

Subsequently, GM and Elwell entered into a settlement under which Elwell received an undisclosed sum of money. As part of the settlement, an "agreed" or "stipulated" permanent injunction was entered in the Wayne County Circuit Court without a hearing. The stipulated injunction was considerably broader than the preliminary injunction and prohibited Elwell from:

> (1) consulting or discussing with or disclosing to any counsel or other attorney or person any of General Motors Corporation's trade secrets, confidential information or matters of attorney-client privilege or attorney-client work product relating in any manner to the subject matter of any litigation, whether already filed or filed in the future, which Ronald E. Elwell received or had knowledge of during his employment General Motors Corporation; and
>
> (2) testifying, without the prior written consent of General Motors Corporation, either upon deposition or at trial as an expert witness, or a witness of any kind, and from consulting with attorneys or their agents in any litigation already filed or to be filed in the future, involving General Motors Corporation as an owner, seller, manufacturer and/or designer of the product(s) in issue. Provided, however, paragraph (2) of the Order shall not operate to interfere with the jurisdiction of the Court in the Georgia case referred to in the Stipulation.

Pet. App. 20a-21a. The settlement agreement also provided that if Elwell were ordered to testify by a court or other tribunal, he could do so without violating the settlement agreement. Pet. App. 5a.

In the case at bar, GM sought to exclude Elwell's testimony on the ground that the Michigan injunction was entitled to Full Faith and Credit in the federal court in Missouri. Pet. App. 18a. After *in camera* review of the Michigan injunction and the settlement agreement, the district court issued an order dated June 18, 1993, allowing the plaintiffs to depose Elwell and to call him as a witness at trial.

The district court explained that Elwell's testimony would be highly relevant:

> The parties agree that Elwell is an expert on G.M. fuel systems, including the design history, fuel system safety, design decision-making and subsequent alternative designs. These are the areas into which plaintiffs wish to inquire.

Pet. App. 22a. The court noted that petitioners had committed not to seek any information that might be subject to the attorney-client privilege or attorney work product privilege, or that otherwise might be confidential. *Id.* The court explained that "the overbroad injunction has prevented the disclosure of not only privileged information, but much discoverable information as well." *Id.* at 27a-28a.

The district court held that the Michigan injunction impermissibly attempted to resolve the rights of nonparties:

> Unlike a traditional injunction situation, this injunction established not only the rights of the parties before the Michigan Court where the case in which it was entered was pending (i.e. Elwell, G.M. and engineer Bill Cichowski), but, if defendant were to prevail here, forever defined the rights of innocent third parties who have a keen interest in the information which Elwell holds.

Id. at 28a. The court noted that "Elwell's cooperation with the

injunction was bought for an undisclosed sum of money as one of the terms of the settlement of his claims against G.M." *Id.* at 26a. The court also explained its "perception" that "G.M. bought Elwell's silence on any matters that could be damaging to G.M.'s interest." *Id.* "G.M. has not only prevented Elwell from speaking on his own behalf, but no one else may find out what he knows, effectively blockading a litigant's search for the truth and for redress." *Id.*

Elwell's trial testimony concerned his research on fuel-fed engine fires. Elwell testified in support of petitioners' claim that the alleged defect in the fuel pump system contributed to the post-collision fire. Tr. 384-89, 391-97. He also testified regarding a 1973 memorandum known as the "Ivey" document. Tr. 407-15; Plaintiffs' Exhibit 621; Pet. App. 6a. The Ivey document is a value analysis prepared by Edward Ivey, an Advance Design employee, and allegedly circulated among selected top GM and Oldsmobile officials. The Oldsmobile officials were at that time responsible for the overall fuel system design of GM vehicles. Pet. App. 6a.

The Ivey document analyzed the potential expense of the loss of human life per vehicle due to fuel-fed engine fires. The memorandum stated that "[e]ach fatality has a value of $200,000." Tr. 415. It concluded that the cost to society of deaths and injuries from such fires was only about $2.40 per vehicle. Tr. 415-16; Pet. App. 6a. According to Elwell, the memorandum addressed

> what we were able to spend in our opinion to eliminate those fires . . . . [T]he Value Analysis says all we have got is $2.[40] to play with, if you will. We can either put that money in a fuel tank, put that money in a fuel pump, put that money in a fuel line, but in our opinion in order to save these people from dying we can put only $2.[40] into the new cars.

Tr. 418-19.

At no point in Mr. Elwell's testimony did GM object to any question or answer on the grounds of attorney-client, attorney-work-product, or trade secrets privilege.

Following trial, the jury awarded Ms. Garner's children $11.3 million in damages.

4. The Court of Appeals' Decision. On June 14, 1996, the Court of Appeals reversed the district court's judgment and ordered a new trial. As to the discovery sanction, the Court of Appeals agreed that GM had failed to comply with the district court's orders regarding discovery. Pet. App. 8a-9a & n.6. The Court of Appeals further agreed with the district court that GM's failure was "willful" and that the plaintiffs suffered prejudice. *Id.* "GM's conduct, therefore, clearly justified the imposition of Rule 37 sanctions." *Id.* at 9a. Nonetheless, the Court of Appeals held that the district court's sanction "was simply too severe for the facts presented and should have been drawn more narrowly." *Id.* at 10a. In particular, the court noted that "'there is a strong policy favoring a trial on the merits and against depriving a party of his day in court.'" *Id.* at 9a (citation omitted). "[T]he opportunity to be heard is a litigant's 'most precious right and should be sparingly denied.'" *Id.* (citation omitted).[3]

On the Full Faith and Credit issue, however, the Court of Appeals disregarded its own teaching concerning the importance of the right to be heard. The court agreed with GM that the Michigan injunction prevented the district court from admitting Mr. Elwell's testimony. Pet. App. 13a-16a. Even though petitioners were unrepresented nonparties in the Michigan proceeding, the Court of Appeals held that they could be bound by it:

> [T]he district court emphasized the importance of other

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[3] The ruling of the Court of Appeals with respect to the sanctions issue is not before this Court.

> interests, such as the discovery rights of litigants, of which it believed the Michigan court was unaware when it entered the injunction. We find no evidence in the record to support such a statement. A stipulation in which GM expressly approved of Elwell's testimony in another case then pending was executed concurrently with the injunction. The Michigan court was, therefore, aware of the existence of at least some other parties' interests. The district court also would have assumed, as did the parties, that other similar litigation would follow; the injunction would otherwise have been unnecessary. Consequently, we find that the appellees failed to establish that the Michigan injunction was not entitled to full faith and credit.

Id. at 15a-16a (citation and footnote omitted).[4]

On June 26, 1996, petitioners filed a timely Petition for Rehearing En Banc, which under Eighth Circuit Rule 35A(4) functioned both as a petition for rehearing and a suggestion for rehearing en banc, and which was treated by the Eighth Circuit as such. Pet. App. 1a. On July 26, 1996, the Eighth Circuit denied the rehearing petition without comment.

On March 24, 1997, this Court granted the petition for writ of certiorari.

SUMMARY OF ARGUMENT

GM attempted to prevent third parties, including petitioners, from obtaining the testimony of its former employee, Mr. Elwell, by entering into a stipulated consent judgment in Michigan state court as part of a settlement with Elwell. The Michigan injunction purported to bar Elwell from testifying even as to non-

[4] The Court of Appeals also held that the jury instructions for "aggravating damages" were inadequate. Pet. App.10a-13a. The correctness of this holding is not before this Court.

privileged, non-trade-secret information.

I. The Eighth Circuit erred in holding that the Full Faith and Credit obligation precludes petitioners from obtaining Mr. Elwell's testimony in a federal court in Missouri. That holding is flatly inconsistent both with basic principles of due process and with the Full Faith and Credit obligation set out in 28 U.S.C. § 1738. Third parties cannot be bound as a matter of Full Faith and Credit to judgments in prior proceedings in which they did not participate and in which they were not represented. This Court has held that "a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985). Hence, it is not surprising that the Eighth Circuit's judgment stands in square conflict with the decisions of at least 33 lower courts that have permitted Elwell to testify despite the Michigan injunction. *See* Addendum hereto.

The fact that Elwell was present in the Michigan proceeding is irrelevant, for GM is attempting to use the Full Faith and Credit obligation to deny *petitioners* the right to pursue a lawful claim by eliciting relevant evidence.

II. Even if the Full Faith and Credit obligation were somehow triggered here — despite the Due Process Clause — the Michigan injunction should not be given preclusive effect because of the overriding interest of a separate judicial system — in this instance the federal courts established under Article III — in obtaining "every man's evidence." The absence of a Full Faith and Credit obligation is confirmed in this case by the principle of *Donovan v. City of Dallas*, 377 U.S. 408 (1964), which prohibits state courts from enjoining federal judicial proceedings.

If permitted to stand, the Eighth Circuit's ruling would provide wrongdoers with a blueprint for purchasing the silence of potentially vital witnesses — and for defeating the judicial

processes of other jurisdictions. The Court of Appeals' decision would tell wrongdoers that they need only enter into consent decrees with potential witnesses in which those witnesses promise, in exchange for money supplied in accompanying settlement agreements, never to testify in court. Contrary to the Eighth Circuit's reasoning, such an assault upon the integrity of state and federal judicial systems outside Michigan finds no support in the Full Faith and Credit principle.

ARGUMENT

I. THE FULL FAITH AND CREDIT CLAUSE IS INAPPLICABLE BECAUSE DUE PROCESS FORBIDS BINDING ABSENT PARTIES TO A JUDGMENT

1. The Full Faith and Credit statute, 28 U.S.C. § 1738, "directs all courts to treat a state court judgment with the same respect that it would receive in the courts of the rendering state." *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 877 (1996). The Full Faith and Credit statute, however, does not — indeed, could not — override the basic precept of due process that "a judgment or decree among parties to a lawsuit resolves issues among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989).

This Court has observed that the "limits on a state court's power to reflect estoppel rules" are a reflection of a "general consensus 'in Anglo-American jurisprudence'" that a person "'is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Richards v. Jefferson County*, 116 S. Ct. 1761, 1765-66 (1996) (quoting *Wilks*, 490 U.S. at 761-62, and *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). "This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Id.* at 1766 (citation omitted); *see also Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986) ("parties

who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement . . . And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.").

Thus, in such decisions as *Richards v. Jefferson County* and *Hansberry v. Lee*, this Court recognized that due process prohibited binding nonparties to a prior judgment, even when the subsequent litigation occurred in the same state as the prior judgment. The Full Faith and Credit obligation has always been understood to be "subject to the requirements of . . . the Due Process Clause." *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). A party deprived of a "full and fair opportunity to litigate the claim or issue" cannot be bound under either 28 U.S.C. § 1738 or the Full Faith and Credit Clause because the party would not and could not be bound by the judgment even in the state in which it was rendered. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81 (1982) (internal quotation omitted). "In such a case, there could be no constitutionally recognizable preclusion at all." *Id.* at 482-83.

Accordingly, it is well settled that "a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) ("A judgment rendered in violation of due process . . . is not entitled to full faith and credit elsewhere"); *Hanson v. Denckla*, 357 U.S. 235, 255 (1958) ("Delaware is under no obligation to give full faith and credit to a Florida judgment . . . offensive to the Due Process Clause of the Fourteenth Amendment"); *Williams v. North Carolina*, 325 U.S. 226, 230 (1945) (opinion of the Court by Frankfurter, J.) (denying Full Faith and Credit because "those not parties to a litigation ought not to be foreclosed by the interested actions of others"); Restatement (Second) of Conflict of Laws § 104 (1969)

("A judgment rendered without judicial jurisdiction or without adequate notice or adequate opportunity to be heard will not be recognized or enforced in other states.").

Recognition of this basic principle reaches back at least as far as *Pennoyer v. Neff*, 95 U.S. 714, 727, 732 (1878), where this Court held that an Oregon state-court judgment against a California resident was void for lack of personal jurisdiction. *See also Burnham v. Superior Court of California*, 495 U.S. 604, 608-09 (1990) (plurality opinion) ("The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, *see Bowser v. Collins*, Y.B.Mich. 22 Edw. IV, f. 30, pl. 11, 145 Eng. Rep. 97 (Ex. Ch. 1482), and was made settled law by Lord Coke in *Case of the Marshalsea*, 10 Coke Rep. 68b, 77a, 77 Eng. Rep. 1027, 1041 (K.B. 1612). . . . American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted.").

In *Fall v. Eastin*, 215 U.S. 1 (1909), this Court held that Full Faith and Credit did not require Nebraska to bind a purchaser of land to the assignment of property rights contained in a divorce decree entered in Washington, because the Washington decree "gave no such equities as could be recognized" against third parties. *Id.* at 14. *See also Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418-19 (1957) (judgment void and not entitled to Full Faith and Credit where issuing court lacked personal jurisdiction over defendant); *Riley v. New York Trust Co.*, 315 U.S. 343, 356 (1942) (Stone, C.J., concurring) ("A judgment so obtained is not entitled to full faith and credit with respect to those not parties."); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) ("[O]ne is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe . . . .").

2. The Eighth Circuit's decision flies in the face of this

fundamental principle. It bars petitioners — who are concededly complete strangers to the Michigan proceeding that resulted in the Elwell injunction — from introducing his testimony in a wholly separate proceeding in which they seek to pursue their own legal right to recover for death caused by a defective product. Not surprisingly, the Eighth Circuit's judgment directly conflicts with the decisions of some 33 lower courts that have recognized a plaintiffs' right to have Elwell testify despite the injunction. Seven appellate tribunals and 26 trial courts have permitted Elwell to testify as to non-privileged and non-trade-secret matters. *See* Addendum hereto. For example, the California court of appeal explained, in the course of holding the Michigan injunction unenforceable in California, that:

> The Michigan injunction adversely affected petitioners' causes of action against GM by effectively destroying their ability to prove a substantial portion of their case. . . . Neither the petitioners nor their causes of action were subject to the jurisdiction of the Michigan court.

Smith v. Superior Court, 49 Cal. Rptr. 2d 20, 25 (Ct. App. 1996), *review denied*, 1996 Cal. LEXIS 2185 (Cal. Apr. 18, 1996). The Washington Court of Appeals similarly observed that, with respect to the Full Faith and Credit obligation, "[a] judgment cannot affect a stranger to the original lawsuit without violating procedural due process." *Worden v. General Motors Corp.*, Case No. 18127-4-II, slip op. 4 (Wash. App. May 20, 1994).

Since the issuance of the decision below, at least four federal district courts have declined to follow it. *See, e.g., Hart v. General Motors Corp.*, C.A. No. 96-CV-1862-CC, slip op. 3 (N.D.Ga. Feb. 11, 1997) (citing but rejecting Eighth Circuit decision); *Ake v. General Motors Corp.*, 942 F. Supp. 869, 881 (W.D.N.Y. 1996) (specifically "declin[ing] to adopt [the Eighth Circuit's] approach"); *Head v. General Motors Corp.*, CA No. 6:95-3613-20, slip op. 2-3 (D.S.C. July 17, 1996) ("the Michigan injunction is not entitled to full faith and credit because Head

was neither a party to nor in privity with a party to the prior proceeding in Michigan"); *Kibler v. General Motors Corp.*, No. C94-1494R (W.D. Wash. July 10, 1996) (denying defendant's motion to prevent Elwell from testifying as expert witness). Indeed, just prior to the submission of this brief, Mr. Elwell was permitted to testify in a California state proceeding.[5] The Eighth Circuit's decision is thus directly at odds with the overwhelming majority of lower courts on the issue.[6]

3. Nor is it relevant that Elwell participated in the prior Michigan proceeding. For GM is invoking the Full Faith and Credit obligation directly against *petitioners* and other *nonparties* to the Michigan proceeding, in an attempt to deny two interrelated legal and property rights held by those nonparties: the right to pursue a lawful claim of liability,[7] and the right to do so by eliciting relevant, nonprivileged evidence.

Petitioners have separately cognizable interests — indeed, legal rights — that are distinct from Elwell's. Directly apposite here is this Court's decision in *Ex Parte Uppercu*, 239 U.S. 435 (1915) (Holmes, J.). There, the party seeking discovery had not participated in a prior case, in which a court had purported to seal all documents and thereby make them unavailable for

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[5] *See Stephens v. General Motors Corp.*, No. 303305 (Stanislaus County Super. Ct., Calif.)

[6] In a few questionable decisions, some trial courts have held that Elwell could not testify. Pet. App. 35a; *see also Pharo v. General Motors Corp.*, No. 94-5104 (E.D.Pa. Mar. 10, 1997). These decisions were rendered in readily distinguishable circumstances, as in instances where Elwell had previously assisted GM's attorneys in preparing for the very *same* trial in which the plaintiff had sought to call him as a witness. Pet. App. 35a. In *Harris v. General Motors Corp.*, No. 111342 (Super. Ct. Ventura Cty., Calif.), for example, Elwell had been named, pretrial, as an expert witness *by GM*.

[7] It is, of course, settled that "a cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

evidence in other proceedings. In reversing a lower court's order denying petitioner leave to inspect the documents, this Court opined:

> The necessities of litigation and the requirements of justice found a new right of a wholly different kind. So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it . . . . Neither the parties to the original cause nor the deponents have any privilege, and the mere unwillingness of an unprivileged person to have the evidence used cannot be strengthened by such a judicial fiat as this, forbidding it, however proper and effective the sealing may have been against the public at large . . . . As against the petitioner the order has no judicial character, but is simply an unauthorized exclusion of him by virtue of *de facto* power.

Id. at 440-41. A California court of appeals properly explained that "[t]he principle expressed in *Ex Parte Uppercu* is directly applicable here," because the Michigan decree cannot prevent third parties from obtaining Elwell's testimony. *Smith v. Superior Court*, 49 Cal. Rptr. 2d at 27. "The Michigan court had no jurisdiction over the petitioners, who had neither notice of nor opportunity to contest the issuance of the injunction, a decree obtained as a result of a purchased settlement in a completely unrelated case." *Id.*

> Enforcement of the injunction would substantially impair the right of petitioners and others similarly situated to full acquisition of evidence necessary to prosecute their claims against GM without any possible legal redress. Just as in *Uppercu*, enforcement of the injunction against unrelated third parties who are not even remotely connected with the employment dispute between Elwell and GM would constitute acquiescence to an unauthorized exercise of de facto power. Bedrock

constitutional principles mandating procedural fairness preclude such a result.

Id.

II. EVEN IF THE FULL FAITH AND CREDIT OBLIGATION WERE TRIGGERED, IT WOULD YIELD HERE TO OTHER, OVERRIDING PRINCIPLES

Petitioners' primary position is that the Full Faith and Credit obligation is simply inapplicable here because due process prohibits binding third parties to judgments when they were unrepresented in the prior proceedings. But, even if the Full Faith and Credit obligation were somehow triggered here, it would have to yield to overriding principles of law: to institutional and systemic interests in the integrity of judicial proceedings.[8]

1. It is an "ancient proposition of law" that "the public . . . has a right to every man's evidence." *United States v. Nixon*, 418 U.S. 693, 709 (1974) (internal quotation omitted); *see also Jaffee v. Redmond*, 116 S. Ct. 1923, 1928 (1996) (the "right to every man's evidence" is a "fundamental maxim" recognized "[f]or more than three centuries") (internal quotation omitted); *Trammel v. United States*, 445 U.S. 40, 50 (1980) (maxim is a

[8] The instant case does not involve the broad and unresolved questions of the extent to which the substantive policy underlying the law of one jurisdiction must yield to the substantive policy of another. *Compare, e.g., Nevada v. Hall*, 440 U.S. 410, 422 (1979); *Hughes v. Fetter*, 341 U.S. 609, 611-12 (1951); *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939), *with Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990); *Fauntleroy v. Lum*, 210 U.S. 230, 236-38 (1908). Rather, Part II of this brief addresses the narrower, but critical, issue of a jurisdiction's interest in the integrity of its judicial proceedings — in this case of *federal* judicial proceedings.

"fundamental principle" of law); *United States v. Mandujano*, 425 U.S. 564, 572 (1976) ("long accepted in America as a hornbook proposition"); *United States v. Burr*, 25 Fed. Cas. 38, 39 (No. 14,692e) (CC Va. 1807) (Marshall, Circuit Justice) ("[E]very person is compellable to bear testimony in a court of justice.").

As early as 1562, persons having relevant knowledge were compelled by law in England to give evidence in court,[9] and in 1612 Lord Bacon observed that all subjects owed the King "their knowledge and discovery." *Kastigar v. United States*, 406 U.S. 441, 443 (1972) (citing *Countess of Shrewsbury's Case*, 2 How. St.Tr. 769, 778 (1612)). Both the Duke of Argyll and Lord Chancellor Hardwicke invoked the right to every man's evidence during the 1742 debate over the Bill to Indemnify Evidence, which would have granted immunity to witnesses against Sir Robert Walpole, first Earl of Oxford. *Jaffee*, 116 S. Ct. at 1928 n.8.

Thus, what GM purported to purchase from Elwell — his silence even as to non-privileged matters — was not Elwell's to sell. Just as judicial precedents "are not merely the property of private litigants," *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 392 (1994) (internal quotation omitted), so too non-privileged knowledge may not simply be bargained away. Rather, such information is subject to a public right of access in judicial proceedings.

2. The right to every man's evidence is particularly salient here. Former employees serving as whistleblowers have routinely provided important information regarding matters of public health, safety, and other matters of intense public concern. Indeed, during the past two decades, Congress has included whistleblower protection provisions in at least 27 federal statutes which explicitly prohibit retaliation against public and private

[9] *See* Statute of Elizabeth, 5 Eliz. 1, c. 9, § 12 (1562).

sector employees who report violations of environmental, civil rights, and public health laws.[10] Federal employees are protected by express whistleblower safeguards in the Civil Service Reform Act (CSRA), 5 U.S.C. § 2302, as amended by the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, (codified throughout 5 U.S.C.). Some 35 States have adopted whistleblower protection statutes as well. *See* Note, 38 S.D. L. REV. 316 (1993).

The instant case illustrates the importance of the information at stake. Mr. Elwell has drawn public attention to the fire risks of certain models of GM trucks and has testified that GM knew about safety problems with fuel tanks mounted on the trucks' sides.[11] The U.S. Department of Transportation subpoenaed

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[10] Each of the following statutes contains antiretaliation provisions: Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621; Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. § 2641; Asbestos School Hazard Detection Act of 1980, 20 U.S.C. § 3601; Clean Air Act, 42 U.S.C. § 7401; Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601; Department of Defense Authorization Act of 1984, 10 U.S.C. § 1587; Department of Defense Authorization Act of 1987, 10 U.S.C. § 2409; Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001; Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5801; Equal Employment Opportunity Act (Title VII), 42 U.S.C. § 2000e; Fair Labor Standards Act (FLSA), 29 U.S.C. § 215(a)(3); Federal Employers' Liability Act (FELA), 45 U.S.C. § 51; Federal Mine Safety and Health Act (FMSHA), 30 U.S.C. § 801; Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1251; Hazardous Substances Release Act, 42 U.S.C. § 9601; International Safe Containers Act, 46 U.S.C. § 1501; Jurors' Employment Protection Act, 28 U.S.C. § 1861; Longshoremen's & Harbor Workers' Compensation Act, 33 U.S.C. § 901; Migrant Seasonal and Agricultural Worker Protection Act, 29 U.S.C. § 1801; Occupational Safety & Health Act, 29 U.S.C. § 651; Public Health Service Act, 42 U.S.C. § 201; Railroad Safety Authorization Act of 1978, 45 U.S.C. § 421; Safe Drinking Water Act, 42 U.S.C. § 300f; Solid Waste Disposal Act, 42 U.S.C. § 6901; Surface Mining Control & Reclamation Act, 30 U.S.C. § 1201; Surface Transportation Assistance Act of 1978, 49 U.S.C. § 2301; Toxic Substances Control Act, 15 U.S.C. § 2601.

[11] At a 1993 trial that was expressly exempted from the Michigan injunction,

Elwell during its investigation into the estimated 6 million 1973-87 GM pickup trucks with the side-mounted design. The U.S. Court of Appeals pointed to the "potentially damaging testimony" by Elwell regarding fuel tank design in invalidating a class action settlement. *In re General Motors Corp. Pickup Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 811 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995).[12] Nor is Elwell alone. For example, former Chrysler product planning manager Paul Sheridan was terminated and ultimately sued for $82 million by the automaker after raising safety concerns regarding the rear latch on certain models of Chrysler minivans in which at least than 35 people died.[13]

Elwell testified that:

• in numerous prior lawsuits, GM had failed to disclose crash tests showing that in some collisions side-mounted fuel tanks were "badly smashed" and "split open" with holes "as big as melons," Trial Transcript, *Moseley v. General Motors Corp.*, No. 90-V-6276, at 128 (Jan. 14, 1993);

• those tests revealed that the side-mounted design "was not defensible" and "was defective," yet GM continued to use it, *id.* at 136;

• the crash program "was a major, major undertaking, a major project that would have [a] very high level of management approval . . . . [S]omebody was in a big panic." *Id.* at 137-38.

[12] The Third Circuit explained:

> In his deposition, Elwell testified that GM designed a retrofit using a steel cage which prevented the gas tanks from rupturing in side impact testing. He further testified that GM abandoned the retrofit (knowing, because of its own secret crash tests, of the increased fire danger) only because GM feared that it would give the public the wrong impression.

55 F.3d at 811.

[13] *See Chrysler Corp. v. Sheridan*, No, 94-489177-CZ (Cir. Ct. of Oakland Cty., Mich. Mar. 27, 1996) (enjoining Sheridan from disclosing proprietary or confidential information, although exempting disclosures to the NHTSA and trial testimony). According to Sheridan, the latch was vulnerable to failure in minor collisions, and occupants were sometimes ejected when the

The issue is not limited to the auto industry, nor is it limited to civil litigation between private parties. For example, Brown & Williamson Tobacco Corporation procured a Kentucky state-court injunction against Jeffrey Wigand, former vice-president for research and development at Brown & Williamson, in an attempt to prevent him from being called to testify by the Mississippi Attorney General in a civil case in a Mississippi court.[14] Four tobacco companies have also sought injunctions from a North Carolina court to prevent former Liggett Group executives from testifying in tobacco cases brought by state attorneys general.[15]

In *EEOC v. Astra USA, Inc.*, 94 F.3d 738 (1st Cir. 1996), the court of appeals invalidated a provision of an employment discrimination settlement in which the plaintiff agreed not to cooperate with the EEOC's sexual harassment investigation involving other employees. The court explained that, "if victims of or witnesses to sexual harassment are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of investigations would be severely hampered." *Id.* at 744. The court added that the right to provide truthful information to the EEOC "is not a right that an employer can purchase from an employee, nor is it a right that an employee can sell to her employer." *Id.* at 744 n.5; *see also Hamad v. Graphic*

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latch opened. NHTSA officials blamed the latch for some 35 deaths, and Chrysler ultimately promised to replace the latches for free. *See Minivan Liftgates Opened in Transit, Court Told*, DETROIT FREE PRESS, July 12, 1996, at 7E.

[14] *See* Alix M. Freedman, *The Deposition: Cigarette Defector Says CEO Lied to Congress About View of Nicotine*, WALL ST. J., Jan. 26, 1996, at A1; Robb Mandelbaum, *Whistle-Blowers; Brown & Williamson v. Wigant*, AM. LAW., Mar. 1996, at 115; Myron Levin, *Smoking Gun: The Unlikely Figure Who Rocked the U.S. Tobacco Industry*, L.A. TIMES, June 23, 1996, at D1.

[15] *See* Lyle Denniston, *High Court to Rule on Bid by GM to Block Testimony*, BALTIMORE SUN, Mar. 25, 1997, at 1C.

Arts Center, Inc., 72 Fair Empl. Prac. Cases (BNA) 1759 (D. Or. Jan. 3, 1997) (refusing to enforce a secrecy provision in a settlement agreement between a company and a former employee when the latter was called to testify in a racial discrimination case).

All of these examples illustrate the danger of the Eighth Circuit's aberrant view that wrongdoers may purchase the silence of whistleblowers — and of other potential witnesses even if they are not former employees. Under the Eighth Circuit's approach, courts of other jurisdictions would be powerless to permit, much less to compel, the introduction of probative, non-privileged evidence that was subject to a state or local injunction. Such a result would provide potential wrongdoers with a blueprint for defeating civil, administrative, or even criminal prosecution.

In particular in a case such as this, denying state and federal courts relevant and nonprivileged evidence would plainly intrude on the institutional integrity of the respective judicial systems themselves. Judicial proceedings could become instruments of injustice rather than searches for truth.

Numerous lower courts have recognized precisely this point in permitting Mr. Elwell to testify. A California court of appeal explained that the injunction "would undermine the fundamental integrity of this state's judicial system." *Smith v. Superior Court*, 49 Cal. Rptr. 2d at 27. Similarly, a federal district court in Arizona explained that the Michigan injunction "prevents the jury from making a determination based upon all the relevant, admissible evidence. The effect is an obscured search for truth." *Hannah v. General Motors Corp.*, No. Civ. 93-1368 PHX RCB, slip op. 5 (D. Ariz. May 30, 1996); *see also Kibler v. General Motors Corp.*, No. C94-1494R, slip op. 2 (W.D. Wash. July 10, 1996) (injunction interferes with "the search for truth at trial"); *Williams v. General Motors Corp.*, 147 F.R.D. 270, 273 (S.D. Ga. 1993) ("Any interest GM might have in silencing Elwell as to unprivileged or non-trade-secret information is outweighed by the public interest in full and fair discovery."); *Bishop v. General*

Motors Corp., No. 94-286-S, slip op. 2 (E.D. Okla. June 29, 1994) (injunction unenforceable because it infringes Oklahoma and federal interest in "full discovery").

3. The fundamental and overriding interests implicated here mean that the Michigan state-court injunction cannot bar the taking of relevant, unprivileged testimony in the Missouri federal court. To give the courts of a state the power affirmatively to interfere with the course of proceedings in the courts of another jurisdiction would in essence allow them to "commandeer" the official processes of another sovereign. *New York v. United States*, 505 U.S. 144, 161, 170, 173, 176 (1992) (Tenth Amendment context). This Court has never interpreted Art. IV, § 1 as a boundless inroad into the internal operations of the judicial branches of sister states or the federal government.[16] So construing the Full Faith and Credit obligation would run counter to the constitutional plan and "risks the very kind of parochial entrenchment on the interests of other States that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion).[17]

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[16] The framers rejected even the lesser step of deeming the rendering state's judgment a judgment of the enforcing state. *See Williams v. North Carolina*, 325 U.S. 226, 229 (1945) ("the [Full Faith and Credit] Clause does not make a sister-State judgment a judgment in another State. The proposal to do so was rejected by the Philadelphia Convention.").

[17] Although the Restatement does not recognize a substantive public policy exception to the Full Faith and Credit obligation, *see* Restatement (Second) of Conflict of Laws § 117 (1971), it does recognize a limited exception for judgments "involv[ing] an improper interference with important interests of the sister State." *Id.* at § 103; *see* Hon. Ruth Bader Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 808 & n.45, 819 n.87 (1969); Willis M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 164, 171-77 (1949) (outlining exception

The Full Faith and Credit obligation simply does not warrant the affirmative interference with ongoing judicial proceedings that enforcing the Michigan injunction here would trigger. In fact, this Court has never held that an injunction — as opposed to a judgment for money damages — is entitled to Full Faith and Credit. *See* Restatement (Second) of Conflict of Laws § 102, comment c (1971) ("The Supreme Court of the United States has not had occasion to determine whether full faith and credit requires a State of the United States to enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act. No definite statement on the point is therefore made in the rule of this Section."). The Restatement recognizes that the intrusive imposition on the judicial process entailed by injunctive relief is one justification for the reluctance to give it extraterritorial effect.[18]

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based on "forbidden infringement of the interests of a state"). *See also Estin v. Estin*, 334 U.S. 541, 546-47 (1948); *Morris v. Jones*, 329 U.S. 545, 551 (1947); *Williams*, 325 U.S. at 232, 239; *Esenwein v. Esenwein*, 325 U.S. 279, 282 (1945) (Douglas, J., concurring); *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201, 210 (1941); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 273-74 (1935).

[18] Although the Restatement speculates that "[i]t may well be that the Supreme Court, when presented with the question, will hold that the enforcement of such decrees is required by full faith and credit," it goes on to say:

> [I]n support of the view that the enforcement of such a sister State decree lies in the discretion of the forum is the argument made in § 449 of the original Restatement of this Subject that the granting or denying of equitable relief, other than an order for the payment of money, is a matter of discretion and that "[t]he decision by one court to give specific relief . . . will not limit another court and thus exclude the use of the discretion of the second court." Also the enforcement of a judgment ordering or enjoining the doing of an act might on occasion require continuing

Thus, this Court has opined that an injunction can have "no extraterritorial operation" under the Full Faith and Credit Clause, and that its enforceability must depend on the "local statutes and practice" of the forum state. *Lynde v. Lynde*, 181 U.S. 183, 187 (1901). *See also Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 128-29 (1904) (enforcement of otherwise valid judgment may be defeated if courts of state where enforcement is sought are not equipped to fashion the remedy specified by the original decree); *cf. Tennessee Coal Iron & R.R. Co. v. George*, 233 U.S. 354, 360 (1914) ("jurisdiction is to be determined by the law of the court's creation, and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action").

In particular, lower courts have traditionally held that injunctions *directed at the judicial process itself* are not entitled to Full Faith and Credit. It is hornbook law that "[n]either the full faith and credit clause nor rules of comity require compulsory recognition of an injunction issued in another jurisdiction against the prosecution of a local action at law." 42 Am. Jur.2d *Injunctions* § 227.[19] The Restatement gives, as an

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supervision by the enforcing court or be otherwise onerous.

Restatement (Second) of Conflict of Laws § 102, comment c; *see also* Michael Collins, Comment, *The Dilemma of the Downstream State: The Untimely Demise of Federal Common Law Nuisance*, 11 B.C. Envtl. Aff. L. Rev. 295, 397 n. 474 (1984) ("The Supreme Court has not ruled whether full faith and credit require the enforcement of another state's equitable decrees. State courts have typically assumed it does not."); Comment, *Developments in the Law— Injunctions*, 78 Harv. L. Rev. 994, 1044 (1965) (distinguishing money judgments from injunctions for Full Faith and Credit purposes).

[19] *See also* Justice Ginsburg, 82 HARV. L. REV. at 823 ("state courts that have dealt with the question have consistently regarded such decrees as outside the full faith and credit ambit"); Annot., 74 A.L.R.2d 828, § 4 ("[I]t has been held that an antisuit injunction issued by a court of one state is not entitled to recognition in the courts of a sister state and does not preclude the maintenance of the action enjoined.").

example of its "improper interference with important interests" exception, the proposition that "full faith and credit does not require a State to recognize a sister State injunction against suit in its courts." Restatement (Second) of Conflict of Laws at § 103, comment b.

It follows *a fortiori* from these principles that the Michigan injunction here is not entitled to Full Faith and Credit. For that injunction affirmatively threatens the institutional integrity of ongoing judicial proceedings in federal and state courts outside Michigan. As one court reasoned in permitting Elwell to testify, "[p]ermanent injunctions entered in a sister state offer more potential for interference with the forum state's interests as a sovereign entity than do monetary judgments." *Bray v. General Motors Corp.*, No. 93-C-265, slip op. 5 (D. Colo. Jan. 20, 1995). *See also Meenach v. General Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1996) ("neither the Full Faith and Credit Clause nor rules of comity require compulsory recognition of an injunction issued in another jurisdiction").

4. Under the principle of *Donovan v. City of Dallas*, 377 U.S. 408 (1964), the absence of a Full Faith and Credit obligation is especially clear in the case at bar. For this case involves the power of a *state* court to prevent the admission of relevant and probative evidence in an ongoing *federal* judicial proceeding. Yet "the old and well-established judicially declared rule [is] that state courts are completely without power to restrain federal-court proceedings in *in personam* actions like the one here." *Id.* at 412-13. This rule is premised on the general maxim that "state and federal courts would not *interfere with* or try to restrain each other's proceedings." *Id.* at 412 (emphasis added). And it does not matter whether an injunction is "addressed to the parties rather than to the federal court itself." *Id.* at 413; *see also General Atomic Co. v. Felter*, 434 U.S. 12, 17-18 (1977) (*per curiam*).

Here, of course, the explicit effect given by the Eighth Circuit to the Michigan injunction is to bar petitioners from introducing

Elwell's testimony in a federal court in Missouri. If a state court's judgment is to be given the effect of enjoining federal court litigants in such a manner, then there is nothing to prevent a state court from barring parties in federal court from introducing specified documentary evidence; from prohibiting plaintiffs (or defendants) from asserting particular legal claims (or defenses); from insisting that witnesses in a federal proceeding testify in a specified manner; or otherwise from controlling federal court litigation.

In short, the Eighth Circuit's decision would eviscerate the rule of *Donovan v. Dallas*, the purpose of which is to avoid "the difficulties that are the necessary result of an attempt to exercise [judicial] power over a party who is a litigant in another and independent forum." 377 U.S. at 413 (internal quotation omitted).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed insofar as it held that the Full Faith and Credit obligation prevented Ronald Elwell from testifying in this case.

Respectfully submitted.

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May 23, 1997

ADDENDUM

COURT DECISIONS ALLOWING ELWELL TESTIMONY

APPELLATE COURT DECISIONS:

1. *Carpenter v. General Motors Corp.*, Case No. 93-CA-1788-OA, (Ky. Ct. App. Sept. 20, 1993) (setting aside lower court order granting defendant General Motors Corporation's motion to quash plaintiff's motion to take out-of-state deposition of Ronald Elwell and granting plaintiff's motion to take deposition of Elwell).

2. *General Motors Corp. v. The Honorable Benjamin Euresti, Jr., Judge*, Case No. 94-1092 (Tex. Nov. 12, 1994) (overruling relator General Motors Corporation's motion for leave to file petition for writ of mandamus); *Correa v. General Motors Corp.*, No. 93-04-1704-A (Dist. Ct. Cameron Co. Sept. 22, 1994) (order granting plaintiffs' motion to depose Ronald Elwell).

3. *General Motors Corp. v. The Honorable J. Ray Gayle, III, Judge*, Case No. 94-1163 (Tex. Nov. 15, 1994) (overruling relator General Motors Corporation's motion for leave to file Petition for Writ of Mandamus and Motion for Emergency Stay); *General Motors Corporation, Relator v. The Honorable J. Ray Gayle, III, Judge, Respondent*, Case No. B14-94-01082-CV (Tex. Civ. App. Nov. 10, 1994) (denying relator General Motors Corporation's petition for leave to file petition for writ of mandamus and emergency motion to stay deposition of Ronald Elwell); Delarosa v. General Motors Corporation, et al., Case No. 90G2176; *Meche v. General Motors Corp.*, Case No. 91G1378; *Robinson v. General Motors Corp.*, Case No. 93G2052; *Heidaker v. General Motors Corp.*, Case No. 93G1357; *Norton (Daniel) v. General Motors Corp.*, Case No.

93M2036 (Dist. Ct. Brazoria Co. July 12, 1994) (granting plaintiffs' collective motions for deposition of Ronald Elwell); "Order on Motion of Rehearing and Motions to Permit Videotape Deposition of Ronald E. Elwell" (Aug. 8, 1994) (granting plaintiffs motions to permit videotape deposition of Elwell).

4. *General Motors Corp. v. The Honorable Robert Garza, Judge*, Case No. 94-0494 (Tex. June 29, 1994) (granting relator General Motors Corporation's motion to withdraw motion for leave to file petition for writ of mandamus (pursuant to settlement)); *General Motors Corp. v. The Honorable Robert Garza, Judge*, Cause No. 13-94-168-CV (Tex. Civ. App. May 3, 1994) (overruling relator General Motors Corporation's motion for leave to file petition for writ of mandamus) (rendered May 3, 1994); *Huerta v. General Motors Corp.*, Cause No. 93-12-7022-B (Dist. Ct. Cameron Co. Mar. 7, 1994) (granting plaintiff's motion to consult with and take the deposition of Ronald Elwell).

5. *Meenach v. General Motors Corp.*, 891 S.W.2d 398 (Ky. 1995) (holding that the lower court may modify the Michigan injunction to allow plaintiffs access to non-protected facts in the possession of Elwell).

6. *Smith v. Superior Court (General Motors Corp., Real Party in Interest); Stephens v. Superior Court (General Motors Corp., Real Party in Interest)*, 49 Cal.Rptr.2d 20 (Cal. App. 5th Dist. 1996) (granting plaintiffs' motions to obtain the testimony of Ronald Elwell).

7. *Worden v. General Motors Corp.*, Case No. 18127-4-II (Wash. App. May 20, 1994) (upholding trial court's order granting plaintiffs' motion for video deposition and/or trial testimony of Ronald Elwell and denying defendant's motion for protective order to prevent Elwell's testimony); *Worden v.*

General Motors Corp., Case No. 92-2-11770-9 (Sup. Ct. of Pierce Co. Mar. 11, 1994) (denying General Motors Corporation's motion for protective order to prevent testimony of Ronald Elwell and granting plaintiffs' motion for videotaped deposition and/or trial testimony of Elwell).

TRIAL COURT ORDERS:

8. *Ake v. General Motors Corp.*, 942 F. Supp. 869 (W.D.N.Y. 1996) (denying defense motion to preclude Elwell from testifying).

9. *Anderson v. General Motors Corp.*, Case No. 342-160528-95 (Dist. Ct. Tarrant Co., Tex. Mar. 19, 1996) (granting plaintiffs' motion to obtain the testimony of Ronald Elwell and imposing conditional sanctions upon GM if it seeks and is denied mandamus relief).

10. *Bishop v. General Motors Corp.*, Case No. 94-286-S, (E.D. Okla. June 29, 1994) (denying General Motors' for protective order preventing the taking of Ronald Elwell's deposition).

11. *Bray v. General Motors Corp.*, Civil Action No. 93-C-2656 (D. Colo. Jan. 20, 1995) (granting plaintiff's motion to permit the deposition of Ronald Elwell).

12. *Colmenares v. General Motors Corp.*, Case No. BC004030 (Super. Ct. Los Angeles Co. Sept. 13, 1993) (denying General Motors Corporation's motion for protective order that deposition of Ronald Elwell not be taken) (entered September 13, 1993).

13. *Diaz v. General Motors Corp.*, Cause No. C-079-94-B, (Dist. Ct. Hidalgo Co. Aug. 31, 1994) (granting plaintiff's motion to take deposition of Ronald Elwell).

14. *Dixon v. General Motors Corp.*, Civil Action No. 2:94-CV-314PS (S. D. Miss. May 1, 1995) (granting plaintiffs' motion to call Ronald Elwell at trial and denying General Motors Corporation's motion for protective order).

15. *Downen v. General Motors Corp.*, Case No. CIV 144604 (Super. Ct. Ventura Co., Calif. May 5, 1995) (granting plaintiff's motion to take videotaped deposition of Ronald E. Elwell).

16. *Gonzales v. General Motors Corp.*, CV-93-87-M-CCL (D. Mont. Feb. 14, 1995) (granting plaintiff's motion to take deposition of Ronald Elwell).

17. *Hannah v. General Motors Corp.*, Case No. CIV 93-1368 PHX RCB (D. Ariz. May 29, 1996) (granting plaintiffs' motion to vacate and/or modify the Order regarding Elwell's testimony and denying defendant's motion to strike Elwell from plaintiffs' witness list); *Hannah v. General Motors Corp.*, Case No. CIV 93-1368 PHX RCB (D. Ariz. Feb. 4, 1996) (deferring ruling on defendant's motion to strike Elwell from plaintiff's witness list and preclude his testimony; allowing plaintiffs 90 days to petition the Michigan court for a modification of the permanent injunction).

18. *Hart v. General Motors Corp.*, C.A. No. 96-CV-1862-CC (N.D.Ga. Feb. 11, 1997) (granting plaintiff's motion to permit deposition of Elwell).

19. *Head v. General Motors Corp.*, CA No. 6:95-3613-20 (D.S.C. July 17, 1996) (granting plaintiff's motion to allow Elwell to testify).

20. *Kibler v. General Motors Corp.*, No. C94-1494R (W.D. Wash. July 10, 1996) (denying defendant's motion to prevent Elwell from testifying as expert witness).

21. *Koval v. General Motors Corp.*, Case No. 137016 (Ct. Common Pleas, Cuyahoga Co., Ohio Aug. 28, 1992) (ordering that deposition of Ronald Elwell may proceed as noticed).

22. *Martin v. General Motors Corp.*, Case No. 92CIV0724 (Ct. Common Pleas, Medina Co., Ohio Oct. 21, 1994) (ordering that the deposition of Ronald Elwell be taken).

23. *Norton v. General Motors Corp.*, Case No 3:93-CV-62(W) (S) (S.D. Miss. Nov. 20, 1993) (granting plaintiffs' motion to take Elwell's deposition).

24. *Peoples v. General Motors Corp.*, Case No. CV 91-490J (Cir. Ct., Limestone Co., Ala. June 8, 1993) (denying General Motors' motion to quash plaintiff's deposition subpoena to Elwell).

25. *Pollan v. General Motors Corp.*, Case No. 92-47545 (Dist. Ct., Harris Co., Tex. Dec. 27, 1993) (denying General Motors' motion for reconsideration of order permitting deposition of Ron Elwell).

26. *Renze v. General Motors Corp./O'Connor v. General Motors Corp.*, LAW No. L93-2080 (Cir. Ct. of City of Va. Beach, Va. Apr. 14, 1995) (granting plaintiffs' motion to consult with and take the video deposition of Ronald Elwell and denying General Motors Corporation's motion for protective order prohibiting plaintiffs from taking the deposition of or consulting with Ronald Elwell).

27. *Roberts v. General Motors Corp.*, Case No. E-12577 (Super. Ct. Fulton Co., Ga. Dec. 20, 1993) (granting plaintiff's motion for order permitting deposition of Ronald Elwell).

28. *Ruskin v. General Motors Corp.*, Case No. CV930073883, 1995 WL 41399 (Super. Ct., Litchfield, Conn.

Jan. 25, 1995) (granting plaintiff's motion to take deposition of Elwell).

29. *Shaffer-Kleoppel v. General Motors Corp.*, Case No. 93-0498-CV-W-8 (W.D. Mo.) (granting plaintiff's motion to depose Ronald Elwell and ordering that deposition shall not be limited to factual testimony but may include opinion testimony).

30. *Shoemaker v. General Motors Corp.*, Case No. 91-0990-CV-W-8; *Baker v. General Motors Corp.*, Case No. 91-0991-CV-W-8, (W.D. Mo. June 18, 1993) (granting plaintiffs' motion to take videotape deposition of Ronald Elwell and denying General Motors' motion for protective order).

31. *Thompson v. GMC Truck Center*, Case No. BC045258 (Super. Ct. Los Angeles Co., Calif. Apr. 7, 1994) (permitting Ronald Elwell to testify at trial over defendant's contrary motion).

32. *Vasquez v. General Motors Corp.*, Case No. 223079, (Super. Ct. Kern Co., Calif. May 6, 1994) (granting plaintiff's motion for an order permitting testimony by expert Ronald Elwell).

33. *Williams v. General Motors Corporation*, 147 F.R.D. 270 (S.D. Ga. 1993) (granting plaintiffs' motion to depose Ronald Elwell).

No. 96-653

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KENNETH LEE BAKER and STEVEN ROBERT BAKER, by his next friend, MELISSA THOMAS,
Petitioners,
v.
GENERAL MOTORS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF RESPONDENT

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July 21, 1997

QUESTION PRESENTED

Whether the Full Faith and Credit Clause and the Full Faith and Credit Statute require courts to respect an injunction issued by a state trial court in a judicial proceeding by giving it the same faith and credit that it receives in courts of the State of issuance.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, General Motors Corporation advises the Court that the following is a list of General Motors' non-wholly-owned subsidiaries as reported to the Securities and Exchange Commission in Exhibit 21 to General Motors' Form 10-K Annual Report for the year ended December 31, 1996.

Asset Leasing GMbH
Carus Grundstucks-Vermietungsgesellschaft mbH & Co.
General Motors GmbH & Co. OHG
Opel-Automobilwerk Eisenach-PKW GmbH
Auto Cable Industries (Pty) Limited
Convesco Vehicle Sales GmbH
Contro Toonico Herramental, S.A. de C.V.
Packard Electric Hebi Co., Limited
Packard Electric Bai Cheng Co., Limited
Delphi Italia Automotive Systems S.r.1.
Delphi Italia Service Center S.r.1.
DRB s.a./n.v.
Opel France S.A.
ENCI S.A.R.L.
Texton P.L.C.
Delphi Harrison
Delphi L'EM Argentina S.A.
Reinshagen Tournai S.A.
GM Ovonic L.L.C.
Banque Opel
General Acceptance (Thailand) Ltd.
Holden National Leasing Limited
GM Finance HB
OPEL Leasinggesellschaft mbH
Polbank, S.A.
P.T. GMAC Lippo Finance

RULE 29.6 STATEMENT
(continued)

General Motors de Argentina S.A.
Beijing Wanyuan GM Automotive Electronic Control Co., Ltd.
Hubei Delphi Automotive Generator Co., Ltd.
Saginaw Norinco Lingyun Drive Shaft Co., Ltd.
Zhejiang Delphi Asia-Pacific Brake Co. Ltd.
General Motors Colmotores, S.A.
IBC Vehicles Limited
Millbrook Pension Management Ltd.
DIRECTTV Enterprises, Inc.
IBC Vehicles (Distribution) Limited
GM-Saab Communication GmbH
Packard CTA Pty. Ltd.
Packard Electric Systems Samara Cable Company
PT General Motors Buana Indonesia
P.T. Packard Kabelindo Murni Indonesia
Radiodores Richard, S.A.

In addition, General Motors has recently acquired an interest in PanAmSat Corporation.

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INTRODUCTION

Contrary to petitioners' contentions, this is *not* a case about a purported right to secure every man's evidence or the silencing of whistleblowers. Rather, this case is about respecting the orderly principles of full faith and credit that are "the foundation of any hope we may have for a truly national system of justice, based on the preservation but better integration of the local jurisdictions we have." Hon. Robert H. Jackson, *Full Faith and Credit -- The Lawyer's Clause of the Constitution*, 45 Colum. L. Rev. 1, 34 (1945).

In this case, a Michigan court issued an injunction prohibiting a disgruntled former employee, Ronald Elwell, from testifying against General Motors Corporation ("General Motors") in products liability suits. The injunction was necessary because Elwell had already wrongfully disclosed privileged information and because he specifically admitted to the Michigan court that it was virtually impossible for him to distinguish between what he had learned while at General Motors from privileged sources and what he had learned from non-privileged sources.

Petitioners believe the Michigan injunction is too broad and that it violates public policy. But they steadfastly refuse to bring their objections to the Michigan court that issued the injunction -- most likely because they realize that the Michigan court is too familiar with the *facts* of this case to accept blindly petitioners' unsubstantiated *allegations* that General Motors is trying to purchase the silence of a whistleblower. Instead, petitioners claim nothing short of a hitherto unknown *constitutional right* to avoid the Michigan court and to attack its judgment collaterally in the forum of their choice -- here a United States District Court in Missouri. The Constitution does not grant petitioners the right to such an end-run around the judgment of another State. To the contrary, petitioners' claims are fundamentally at odds with the text and purpose of the Full Faith and Credit Clause and its implementing statute.

STATEMENT OF THE CASE

Petitioners ominously suggest that this case is about purchasing the silence of potential witnesses, suppressing whistleblowers, and manipulating individual state courts to subvert the civil justice system nationwide. In reality, this case is about Ronald Elwell's efforts, acting in concert with attorneys for various plaintiffs across the country, to sell privileged information and to manipulate different court systems to evade the terms of an injunction lawfully entered by a Michigan court.

In what is now a well-rehearsed script, Elwell voluntarily appears in a jurisdiction far from his home where a case against General Motors is pending, the plaintiff's attorney argues that the court need not give full faith and credit to the Michigan injunction, and, where the plaintiff is successful, the court "orders" Elwell to testify. By repeating this maneuver in jurisdictions from coast to coast, Elwell has enabled plaintiffs in products liability actions to purchase his testimony -- at a rate up to $300 per hour, *see infra* page 8 -- in flat defiance of the Michigan judgment.

A. Background to the Underlying Civil Action.

This case involves tort claims arising from an automobile accident that occurred when Doris McElwain tried to pass a truck on Highway 63 in Missouri, and her car slammed head on into a Chevy S-10 Blazer. After the collision, a fire started in the engine compartment of the Blazer. Beverly Garner, a front-seat passenger, was killed in the accident. Pet. App. 3a.

Ms. Garner's children -- Kenneth and Steven Baker -- brought this strict products liability action against General Motors, manufacturer of the Blazer, in Missouri state court. The case was removed to federal court based on diversity of citizenship. Plaintiffs claimed that the Blazer was defective in that its electric fuel pump allegedly continued to pump fuel to the engine after impact; that the fuel started the fire in the

engine compartment; and that the fire, rather than the impact, caused Ms. Garner's death. General Motors vigorously denies that the fuel pump was faulty or that it caused the fire, and also has defended on the ground that Ms. Garner died from injuries sustained in the impact of the collision. Pet. App. 3a.

The case has yet to be tried on the merits. Rather, in the first trial, on the basis of alleged discovery violations, the District Court entered an extraordinary default sanction against General Motors, predetermining the pivotal issues of defect and causation. After an abbreviated trial of the few remaining issues, the jury returned a verdict for the plaintiffs. On appeal, the Eighth Circuit reversed, agreeing with General Motors that the trial court's draconian sanction was not justified. Pet. App. 10a. The case is thus poised to return to the District Court for a new trial.

B. The Michigan Injunction.

One of petitioners' witnesses at the abbreviated trial was Ronald Elwell. During the last 18 years of his career at General Motors, Elwell worked almost exclusively as an integral member of the in-house litigation team whose primary function was assisting General Motors' lawyers in defending products liability cases. J.A. 12-13, 18-22. In this capacity, Elwell was necessarily and regularly afforded access both to General Motors' proprietary trade secret information and to its privileged attorney-client communications and litigation work product. *Id.* Elwell's involvement with litigation matters was so pervasive that he has admitted it is virtually impossible for him to distinguish what he knows about General Motors only from privileged sources and what he knows from other sources. *Id.* at 13.

In 1987, after numerous disagreements about the terms of his employment, Elwell was placed on an unassigned status that paid him $4,440.47 per month for 28 months (after which he would be eligible to retire) and allowed him to seek outside

employment as an expert litigation witness (for General Motors and others), provided that he did not breach any of his continuing fiduciary duties to General Motors. J.A. 13-14, 22. At the end of this unassigned status, General Motors considered Elwell retired, but Elwell refused to execute the retirement papers. In 1991, Elwell sued General Motors in Michigan state court, seeking damages on various employment claims.

A few months before he filed that suit, Elwell had been deposed in a Georgia case brought *against* General Motors. Over General Motors' objections, he gave testimony that wrongfully disclosed General Motors' privileged attorney-client information and attorney work product. *See* J.A. 23-28. Moreover, when he produced five boxes of material in response to a subpoena, it became apparent that he had misappropriated hundreds of documents from General Motors -- documents containing attorney-client communications, attorney work product, and confidential trade secret information. J.A. 14-16; 25-28.

To prevent further violations of its privileges, General Motors counterclaimed in Elwell's Michigan lawsuit and immediately sought a preliminary injunction. Two court days were devoted to a full adversarial hearing in which both sides presented testimony and argument. Based on the episode at the Georgia deposition and other evidence, General Motors demonstrated that Elwell had already violated his duty to maintain its privileges and was likely to do so again. J.A. 9.

After hearing the evidence, the Michigan court enjoined Elwell from disclosing any of General Motors' confidential trade secret information or any matters protected by its attorney-client or work-product privileges. J.A. 9-10. The court ruled that General Motors had "met its burden of proving that: (a) If the relief requested was not given [General Motors] could suffer irreparable injury; (b) There is no adequate remedy at law; (c) Public policy weighs in favor of the issuance of the

injunction; (d) There is a likelihood of success on the merits of the claim." *Id.* at 10. The court thus concluded that Elwell posed a continuing threat to General Motors' legal privileges.

Nine months later, General Motors and Elwell resolved their dispute and entered into 30 binding stipulations. *See* J.A. 11-17. In a stipulation critical here, Elwell acknowledged that his close working relationship with General Motors' lawyers permeates everything he learned during his employment. His pervasive experience as an in-house litigation consultant *makes it "extremely difficult for [him] to determine whether his knowledge with respect to GM only comes from attorney-client and work product communications or from non-privileged communications."* *Id.* at 13 (emphasis added). He also acknowledged "that he owes GM a fiduciary duty not to disclose its confidential information, trade secrets, attorney-client communications, or work product." *Id.* at 16.

In view of these stipulations, Elwell consented to a permanent injunction barring him from testifying against General Motors in products liability actions without General Motors' consent and from consulting with attorneys in such cases. J.A. 16-17. He also agreed to return all confidential and privileged documents relating to General Motors' business. *Id.* at 17.

Based on the entire record before it -- including transcripts from the two-day evidentiary hearing, the findings supporting the preliminary injunction, and the parties' stipulations -- the court entered a permanent injunction. The court expressly found that General Motors had "met the requirements for permanent injunctive relief." J.A. 30. As the court explained:

> Specifically, [General Motors] has met its burden in establishing that if Plaintiff disclosed various forms of privileged information he possesses [it] would be irreparably harmed. Second, [General Motors] has established its burden of showing that its remedy at

> law is inadequate. Third, [General Motors] has established that the public interest weighs in favor of granting a permanent injunction. *Id.*

The permanent injunction bars Elwell from disclosing any of General Motors' "trade secrets, confidential information or matters of attorney-client privilege or attorney-client work product" and prohibits him from "testifying, without the prior written consent of [General Motors], either upon deposition or at trial, as an expert witness, or as a witness of any kind, and from consulting with attorneys or their agents in any litigation involving [General Motors]." *Id.*[1]

C. Elwell's Efforts To Evade the Injunction.

From the day the permanent injunction was entered, General Motors has faced a consistent pattern of conduct by Elwell to evade the terms of the injunction. In fact, it is clear that Elwell has established a lucrative consulting business as an expert witness (although the character of his testimony is often disguised by labeling him a so-called "fact witness") on behalf of products liability plaintiffs suing both General Motors and other auto manufacturers.

Petitioners themselves amply highlight the magnitude of Elwell's nationwide consulting business as they list a string of cases in which plaintiffs have obtained court orders permitting him to testify without General Motors' consent -- cases in Alabama, Arizona, California, Colorado, Connecticut, Georgia, Kentucky, Mississippi, Missouri, Montana, New York, Ohio, Oklahoma, South Carolina, Texas, Virginia, and Washington, at a minimum. *See, e.g.*, Petrs. Br. 30-35. Elwell has sought to testify in other courts as well, but has been barred from doing

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[1] The permanent injunction made a single exception for the Georgia case, which, it was agreed, would be treated differently because Elwell's involvement predated the Michigan lawsuit. J.A. 30.

so.[2] What is most noteworthy about this list is that Elwell has never been permitted to testify against General Motors *in Michigan*, where the courts have consistently enforced the injunction.

Indeed, it is only by manipulating the joints in the state and federal judicial systems that Elwell has been able to dishonor his legal obligations. The injunction plainly bars Elwell from testifying in a case against General Motors. But the plaintiffs for whom Elwell testifies go to great lengths to convince other courts that they can ignore the Full Faith and Credit Clause and effectively override the Michigan judgment by ordering Elwell to testify.[3] Elwell, however, is obviously not a resident subject to the subpoena power of the courts in each of the jurisdictions where these cases are proceeding. When he testified in this case, for example, he resided in New Mexico. *See* Elwell Dep. at 36 (June 23, 1993). Thus, it is only by voluntarily appearing in the jurisdiction -- undoubtedly pursuant to an arrangement with plaintiffs' attorneys -- that Elwell can be subjected to the

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[2] *See, e.g.*, Pet. App. 35a. The most recent examples of cases in which Elwell has been prohibited from testifying because other courts were willing to accord full faith and credit to the Michigan injunction are *France v. General Motors Corp.*, No. CV-95-321 (Ala. Cir. Ct. June 11, 1997), and *Pharo v. General Motors Corp.*, No. 94-5104 (E.D. Pa. Mar. 10, 1997).

[3] Elwell undoubtedly seeks to have courts "order" his testimony to take advantage of an undertaking made by General Motors. When General Motors and Elwell were settling the Michigan lawsuit, they recognized that some courts might erroneously fail to give full faith and credit to the injunction concluding their suit. In light of the Catch-22 situation that such an erroneous ruling might create for Elwell, General Motors agreed that it would not bring an action against Elwell if he testified subject to an order from another court. Pet. App. 5a. Elwell's transparent efforts to make himself available to be "ordered" to testify are a means of wrongfully exploiting that undertaking. But this private undertaking by General Motors has no effect on the scope of the injunction itself, which makes no exception for cases in which another court orders Elwell to testify. *See* J.A. 30-31.

authority of these courts at all. *See id.* at 209-11 ("[H]e has come here and allowed himself to be subpoenaed and to bring himself within the subpoena power of this Court.").[4] If Elwell merely sat at home and refused to cooperate with plaintiffs, courts from Alabama to Washington would be powerless even to contemplate "ordering" his testimony, and the full faith and credit issue would rarely, if ever, arise.

The motivation behind Elwell's extensive activity is also clear enough. In a recent case, he stated that when he testifies for plaintiffs against General Motors, his standard arrangement is to require reimbursement for his "loss of business opportunity" at a rate of $300 per hour. *See* Trial Transcript, *Stephens v. General Motors Corp.*, No. 36740 (Cal. Super. Ct. May 21, 1997) at 3502-03 (Appendix B).[5]

Elwell's activities also belie petitioners' unfounded charge that General Motors has something to hide. Since the injunction was issued, Elwell has been deposed by the National Highway Traffic Safety Administration, which declined to take any action based on Elwell's testimony.[6] And just two months ago, Elwell testified extensively against General Motors in a products liability case. *See Stephens*, *supra*. The jury returned

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[4] In this case, Elwell received service of a subpoena at a downtown hotel in Kansas City, Missouri, the day before the plaintiff's attorneys had scheduled his deposition to be taken in Kansas City. *See* Elwell Subpoena (Appendix A).

[5] As this high rate suggests, whatever plaintiffs choose to label Elwell (they typically go to great lengths to label him a "fact witness"), it is clear that Elwell is a paid witness or consultant. Moreover, plaintiffs stated on the record in this case that the reason they seek to inquire of him is that they view him as an "expert on GM fuel systems." *See* Petrs. Br. 7; Pet. App. 22a.

[6] The fact that Elwell has already been extensively deposed by the relevant government safety enforcement agency eviscerates petitioners' claims that review by this Court is necessary to decide important issues about silencing "whistleblowers."

a complete defense verdict, thus further confirming that Elwell's testimony does not credibly establish any untoward conduct by General Motors.

D. Further Proceedings in the Michigan Courts.

In contrast to courts in other jurisdictions, the Michigan courts have consistently enforced the injunction, reaffirming two important principles under Michigan law. *First*, the injunction is a binding, final resolution of the litigation between Elwell and General Motors that bars Elwell from testifying without General Motors' consent. *Second*, any attempt to modify or vacate the injunction must be brought before the court that issued it.

The first principle was reaffirmed by Elwell's own efforts to modify the injunction. Only two months after the judgment was entered, Elwell moved to modify the injunction so that it would prohibit him only from voluntarily testifying against General Motors, but would not prevent him from testifying subject to a court order. General Motors opposed his motion, and the trial court, adhering to its prior order, denied Elwell's request. *See* Order, *Elwell v. General Motors Corp.*, No. 91-115946-NZ (Mich. Cir. Ct. Nov. 2, 1992) (Appendix C).

The second principle -- that any effort to modify or vacate the injunction must be brought to the court that issued the injunction -- has been confirmed in two separate actions brought in other Michigan trial courts. In each case, the plaintiffs in a products liability action against General Motors raised the same claim pressed by petitioners here -- that the injunction should not bar them from obtaining Elwell's testimony and that Elwell should be ordered to testify. Under Michigan law, however, only the issuing court can enter such an order effectively modifying the injunction. *See* Mich. Ct. R. 2.613(B) (judgment may be set aside or vacated "only by the judge who entered the judgment or order, unless that judge is absent or unable to act").

As a result, in each case, the trial court denied the plaintiffs' motions to alter the injunction. Instead, refusing to arrogate to themselves that authority, the other Michigan courts recognized that such relief should be sought *from the court that issued the injunction in the first place*. *See* Order and Transcript, *Brisboy v. General Motors Corp.*, No. 94-77688-NP (Mich. Cir. Ct. Nov. 9, 1995) (Appendix D); Order, *McLain v. General Motors Corp.*, No. 93-465507-NP (Mich. Cir. Ct. Mar. 3, 1996) (Appendix E).

E. The Decisions Below.

In this case, following the typical pattern, plaintiffs sought an order from the District Court permitting Elwell's deposition, and Elwell went to Missouri and was served with a subpoena. *See supra* note 4. General Motors opposed petitioners' motion, stating that the Michigan injunction must be afforded full faith and credit. The District Court, however, held that the Full Faith and Credit Clause and Statute did not require it to enforce the injunction for two reasons: *first*, the injunction violated Missouri public policy as embodied in the state discovery rules; and *second*, the injunction was subject to modification by the issuing court in Michigan and hence could be freely revised by any other court. Pet. App. 22a-29a. Petitioners did not raise and the District Court did not decide any due process issue.

On appeal, General Motors argued that there was no such thing as a "public policy" exception to full faith and credit, that the injunction does not violate public policy in any event, and that the mere fact that the injunction could be modified by the issuing court does not deprive it of full faith and credit. *See* J.A. 34-38. Petitioners addressed only the same points; again, they raised no due process claim. *See id.* at 47-49.

The Court of Appeals held that the District Court erred in not giving the injunction full faith and credit. Pet. App. 13a-16a. For purposes of resolving the case, the Court of Appeals assumed *arguendo* that there *was* a public policy exception to

the full faith and credit command and went on to conclude that the Michigan injunction did not offend Missouri public policy because Missouri law contains a "public policy in favor of full faith and credit" that is "equally strong" as its policy in favor of full discovery. *Id.* at 14a. In addition, the Court of Appeals held that the controlling command of full faith and credit cannot be evaded merely because an injunction may be subject to modification by the issuing court, particularly where the complaining party has not sought modification from that court. *Id.* at 14a-16a. The Court of Appeals did not address any due process claim, because none had been raised.[7]

On March 24, 1997, the Court granted *certiorari* to decide whether the Michigan injunction should be afforded full faith and credit in this case.

SUMMARY OF ARGUMENT

Petitioners' arguments in this Court bear scant resemblance to the issues presented below. Indeed, two of their claims were neither raised before nor addressed by the Court of Appeals, *see infra*, §§ II, IV, and the third merely repackages a contention that the Court of Appeals assumed *arguendo* in petitioners' favor, *see infra*, § III. Moreover, petitioners make no attempt to address the dispositive issue of state law *actually decided by the Court of Appeals* -- namely, that the Michigan injunction does not violate Missouri public policy. Even considered on the merits, however, petitioners' new arguments do not withstand scrutiny.

1. Petitioners' most ambitious attack is a belated attempt to cast doubt on whether the Full Faith and Credit Clause and its implementing statute apply to injunctions at all. Nothing in the text, history, or purpose of the Clause, however, can

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[7] In fact, petitioners never raised their due process claim until their petition for rehearing in the Court of Appeals. That petition was denied without opinion.

remotely support an exemption for injunctions. By their plain terms, the Clause and its implementing statute apply to all "judicial Proceedings" -- a term that encompasses any judgment, whether embodied in a monetary award or an injunctive decree.

2. While they now demote it to second-tier status, petitioners also continue to press their claim for a "public policy" exception, though they make no effort to address the narrow holding below: that the injunction does not violate *Missouri* public policy.

It has long been settled that there is no "public policy" exception to the command of full faith and credit for judgments. *See Fauntleroy v. Lum*, 210 U.S. 230 (1908). Petitioners' effort to evade that rule by claiming that they seek only a "narrower" exception to protect "systemic interests in the integrity of judicial proceedings," Petrs. Br. 18, is simply a transparent attempt to repackage their public policy argument under a different label. In any event, it is absurd to suggest that an injunction that will have the incidental impact of making a single witness unavailable for a trial will somehow undermine the "institutional integrity" of judicial proceedings.

Petitioners' remaining assertions -- their sensational claims that the injunction allows General Motors to "purchase" Elwell's "silence" and deprives the public of "every man's evidence" -- are nothing but collateral attacks on the merits of the injunction based on petitioners' policy views. Crediting such arguments would mean abandoning this Court's settled precedents rejecting a policy exception to the Clause.

Petitioners' claims, moreover, rest on a grossly distorted picture of the grounds for the injunction and its broader implications -- a picture flatly contrary to the record established in Michigan. Their claims demonstrate perfectly the wisdom of the Full Faith and Credit Clause, which precludes litigants from resorting to an alternative tribunal, unfamiliar with proceedings in the original cause, to attack a state court judgment.

3. Lastly, what petitioners now trumpet as their "primary" argument is simply a red herring. In a claim that they did not even raise until their petition for rehearing below, they now argue that it would violate due process to afford the injunction full faith and credit because they were not parties to the Michigan suit. Even if this new-found argument is properly before the Court, it lacks merit for three reasons.

First, petitioners' desire to have Elwell testify does not rise to the level of a property interest protected by the Due Process Clause. In this regard, petitioners' central reliance on cases in the line of *Martin v. Wilks*, 490 U.S. 755 (1989), is entirely misplaced. While *Wilks* held that a judgment cannot conclude the *rights* of persons not made a party to the action, the right involved there was an independent cause of action guaranteed under federal law. Here, it cannot be seriously contended that enforcing the Michigan injunction would deprive petitioners of a cause of action or any other constitutionally protected interest.

Second, even if petitioners had a protected interest in Elwell's testimony, applying the Full Faith and Credit Clause would not violate due process. Affording the injunction the *same respect* that it would receive in the courts of the rendering State simply requires petitioners to raise their claims for access to Elwell's testimony -- which necessarily require altering the injunction -- in the Michigan court that issued the original decree. Directing petitioners to raise their arguments in that forum, however, merely ensures an orderly procedure and raises no due process concern whatsoever. And there can certainly be no basis for striking down the Michigan rule of procedure that (through principles of full faith and credit) gives the injunction this forum-selection effect against petitioners, especially where the constitutionality of the rule was never considered by either court below. Nevertheless, declaring that state rule unconstitutional would be precisely the consequence of accepting petitioners' new due process claim.

Third, even assuming, *arguendo*, that enforcing the injunction would mean that petitioners are "bound" by it, rather than merely affected by it, their due process claim fails even on its own terms. Under settled law, and consistent with due process limitations, the Michigan injunction binds not only parties, but also persons with notice of the order who act in concert or participation with the parties. Here, it seems clear that Elwell was acting under some arrangement with petitioners' trial counsel when he received service of a subpoena in Missouri for a deposition there. Petitioners themselves thus may be bound directly to honor the terms of the injunction because they have been acting in concert with Elwell to aid and abet his efforts to violate the decree.

ARGUMENT

Before turning to petitioners' specific attempts to evade the commands of full faith and credit, we briefly set forth the history and core objectives of the constitutional provision at the heart of this case -- topics that petitioners studiously ignore.

I. THE HISTORY AND PURPOSE OF FULL FAITH AND CREDIT.

In the Full Faith and Credit Clause, the Framers confronted the critical problem of binding the independent court systems of the separate States into a workable system for dispensing justice in a unified nation. If left unmodified in the Constitution, the principles of the common law would have ensured that each State would be free to treat the judicial decision of another State with no greater respect than was accorded to the judgment of a foreign nation. *See M'Elmolye v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839); 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1302, at 177 (1833); *see also Walker v. Witter*, 1 Doug. 1, 99 Eng. Rep. 1 (1778) (at common law, foreign judgments were regarded solely as *prima facie* evidence of the matter adjudicated and not given conclusive effect).

That loose rule, however, would have produced perpetual disruptions in the administration of justice, for as James Madison pointed out, particularly along the borders between States, it would ensure that judgments were never final, but could be evaded by the simple expedient of crossing a state line. THE FEDERALIST No. 42, at 271 (Clinton Rossiter ed. 1961). Such a result was incompatible with the Framers' plan of establishing a Union in which the States would "no longer be foreign to each other in the sense that they had been," and the Framers thus determined that "for the prosecution of rights in Courts" there must be "an end to the uncertainty upon the subject of the effect of judgments obtained in different states." *M'Elmoyle*, 38 U.S. (13 Pet.) at 325.

The Continental Congress had pointed the way toward a solution to this problem by including a clause in the Articles of Confederation providing that "[f]ull faith and credit shall be given in each of these states to the records, acts, and judicial proceedings of the courts and magistracies of every other State." ARTICLES OF CONFEDERATION art. IV., cl. 3. With little discussion, the Framers expanded on this terse provision by providing more definite means for its implementation:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof. U.S. CONST. art. IV, § 1.

In Madison's view, one of the chief benefits of this provision as an "instrument of justice" was that it conferred upon Congress the power to define with greater specificity the precise respect that courts were required to accord to another State's judgment. THE FEDERALIST No. 42, at 271. And it is an apt reflection of the importance of the Clause to the new Union that the First Congress lost no time in exercising this authority.

In 1790, Congress commanded, in the same broad terms used by the Clause itself, that all "judicial proceedings . . . shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from whence the said records are or shall be taken." Act of May 26, 1790, ch. 11, 1 Stat. 122.[8]

This Court soon made it clear that the measure of full faith and credit declared by Congress would be given complete effect: under the Full Faith and Credit Statute, every State must give the judgment of another State the same force and effect it would have under the local laws of the rendering State. *See Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 484 (1813). As Justice Story explained for the Court, the proper inquiry in every case under the Clause is this: "what is the effect of a judgment in the state where it is rendered." *Id.* Shortly thereafter, Chief Justice Marshall reaffirmed this doctrine, declaring for a unanimous Court that "the judgment of a state court should have the same credit, validity and effect, in every other court of the United States, which it had in the state where it was pronounced." *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234, 235 (1818).

As a result, the Court firmly established that a judgment, conclusive where rendered, cannot be reexamined by any other federal or state court, but rather is "conclusive in the courts of all other States wherever the same matter is brought in controversy." *Christmas v. Russell*, 72 U.S. 290, 305 (1866). Through steady enforcement of the full faith and credit command, this Court has ensured that the Clause will achieve its purpose, of "weld[ing] the independent states into a nation by giving judgments within the jurisdiction of the rendering state

[8] This provision, with only minor amendments over the ensuing two hundred years to cover the territories and possessions of the United States, is now codified at 28 U.S.C. § 1738 (1994).

the same faith and credit in sister states as they have in the state of the original forum." *Johnson v. Muelberger*, 340 U.S. 581, 584 (1951).

II. THE FULL FAITH AND CREDIT CLAUSE AND ITS IMPLEMENTING STATUTE APPLY TO INJUNCTIONS.

Petitioners' broadest attack on principles of full faith and credit is a muted suggestion that the constitutional command does not apply to injunctions. *See* Petrs. Br. at 25. Petitioners never raised this argument below, and even in this Court they stop short of claiming a blanket exemption for injunctive decrees. *See id.* at 25-26. Nevertheless, because their attempt to muddy the waters on this point is logically antecedent to their other efforts at evading full faith and credit, we address it first.

There is no basis in the text, history, or purpose of the Full Faith and Credit Clause for an exception for injunctions. To the contrary, both the Clause and its implementing statute demand in the broadest terms full faith and credit for all "judicial Proceedings." U.S. CONST. art. IV, § 1; *see also* 28 U.S.C. § 1738. That expansive terminology encompasses both monetary judgments *and* injunctive decrees.

Indeed, the term "judicial Proceedings" stands in marked contrast to narrower language used elsewhere in the Constitution. The Framers inherited a legal system that strictly separated equitable actions (where an injunction might be obtained) from actions at law, and at points the Constitution explicitly acknowledges that division. *See, e.g.*, U.S. CONST. art. III, § 2 (the judicial power extends "to all Cases, in Law and Equity"); *id.* amend. VII (guaranteeing right to jury trial only "in suits at common law"). The absence of any similar distinction in the Full Faith and Credit Clause confirms that the unrestricted command of full faith and credit for all "judicial Proceedings" was intended to extend in full measure to decrees of courts of equity, including injunctions.

In light of the clear constitutional text, this Court has never refused to apply the Clause in cases that arise in equity. To the contrary, the Court has applied the Clause to decrees of divorce, *see, e.g., Cheever v. Wilson*, 76 U.S. (9 Wall.) 108, 109 (1869); to the decisions of probate courts, *see, e.g., Simmons v. Saul*, 138 U.S. 439 (1891); and to proceedings brought in state insolvency courts, *see, e.g., Crapo v. Kelly*, 83 U.S. (16 Wall.) 610 (1872). Indeed, as recently as two Terms ago, this Court applied the Clause to a consent decree entered by the Delaware Court of Chancery in a suit alleging claims for breach of fiduciary duty and waste of corporate assets -- classic equitable claims. *See Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 876 (1996).[9]

Reading the Clause to exclude injunctive decrees would manifestly frustrate its core objectives. The Clause would have proved a feeble instrument of federalism if all rights determined on the equity side of courts escaped its protection. Indeed, if anything, guaranteeing full faith and credit for injunctions is especially critical for fulfilling the Clause's purposes. After all, an injunction will issue only after a court first determines that the complainant lacks an adequate remedy at law and that a more specialized remedy is required to prevent irreparable harm. That is the case here; as the Michigan court found, General Motors would suffer irreparable harm if Elwell remained at liberty to reveal privileged information. *See* J.A. 30; *see also, e.g., Admiral Ins. Co. v. United States Dist. Ct.*, 881 F.2d 1486, 1491 (9th Cir. 1988). There is no basis in law or logic for

[9] Although the question now appears to arise infrequently, lower courts have also held that the Clause applies to injunctions. *See, e.g., Gouveia v. Tazbir*, 37 F.3d 295, 300-01 (7th Cir. 1994); *Southeast Resource Recovery Facility Auth. v. Montenay Int'l Corp.*, 973 F.2d 711, 713 (9th Cir. 1992); *Rozan v. Rozan*, 317 P.2d 11, 15-16 (Cal. 1957) (Traynor, J.) ("There is no sound reason for denying a decree of a court of equity the same full faith and credit accorded any other kind of judgment.").

suggesting that, precisely in cases where the potential harm is greatest, the Clause's protection is lacking. Such a rule would defeat the Clause's central objective of ensuring that a judgment obtained in one State would be enforceable throughout the Nation.

Finally, nothing in the modifiable nature of injunctive decrees warrants withdrawing the protections of the Clause. In particular, as the Eighth Circuit recognized, the mere fact that a permanent injunction may be subject to modification in no way alters its character as a final adjudication of legal interests entitled to full faith and credit. To the contrary, every final judgment is subject to being reopened or modified in appropriate circumstances, *see* Fed. R. Civ. P. 60(b); yet the nonrigidity of judgments has never been thought to hinder full faith and credit protection.[10]

[10] Petitioners incorrectly claim that this Court has "opined that an injunction can have 'no extraterritorial operation' under the Full Faith and Credit Clause." Petrs. Br. 26. That both misstates the law and misrepresents the holding in *Lynde v. Lynde*, 181 U.S. 183 (1901). Far from making a general pronouncement about the extraterritorial operation of injunctions, *Lynde* held only that specific "provisions for bond, sequestration, receiver, and injunction" included in an alimony decree for purposes of enforcement in case of default could "have no extraterritorial operation" because they were "in the nature of execution and not of judgment." *Id.* at 187. That ruling implies no peculiar limitation on enforcing injunctions; it simply restates the general rule that a plaintiff must take the machinery for executing any judgment as he finds it in the forum State. *See, e.g., M'Elmoyle*, 38 U.S. (13 Pet.) at 325. Contrary to petitioners' suggestions, it is settled law that a court can enter an injunction that will affect a party's conduct even outside the court's territorial jurisdiction. *See Cole v. Cunningham*, 133 U.S. 107, 116-19 (1890); *Massie v. Watts*, 10 U.S. (6 Cranch) 148, 157 (1810) (Marshall, C.J.).

III. PETITIONERS' CLAIMS THAT FULL FAITH AND CREDIT MUST "YIELD" TO OVERRIDING POLICY CONCERNS ARE MERITLESS.

In the court below, petitioners' primary argument was that there is a "public policy" exception to full faith and credit, and that the Michigan injunction "[v]iolates Missouri [p]ublic [p]olicy" favoring "full and fair discovery." J.A. 49. The Eighth Circuit found it unnecessary to decide whether there is a public policy exception; instead, assuming *arguendo* that such an exception exists, the court held only that giving the Michigan injunction full faith and credit did not violate *Missouri public policy*. *See* Pet. App. 13a-14a. Petitioners have not even attempted to upset the holding on that narrow question of *state* law, which was dispositive of the public policy claim presented to the Court of Appeals. This Court thus has no need to reach petitioners' repackaged version of their public policy claims to affirm the judgment below. *Cf. Pembaur v. Cincinnati*, 475 U.S. 469, 484 n.13 (1986) ("We generally accord great deference to the interpretation and application of state law by the courts of appeals.").

Even on the merits, however, petitioners' public policy claims fail.

A. There Is No Public Policy Exception to the Command of Full Faith and Credit for Judgments.

In *Fauntleroy v. Lum*, 210 U.S. 230 (1908), this Court squarely established that courts cannot refuse recognition to another State's judgment on the ground that enforcing it would violate public policy in the forum State. *See id.* at 236-37. Indeed, the Court declared this rule in the strongest terms. In *Fauntleroy*, a Missouri court had awarded a judgment on a gambling transaction entered into in Mississippi. Even though the original transaction had been *illegal* in Mississippi and could not have been sued upon there, this Court held that after the claim had been reduced to judgment in Missouri, Mississippi

courts were no longer free to enforce Mississippi policy but instead were bound to accord full faith and credit to the Missouri judgment. *See id.*

Since *Fauntleroy*, the Court has repeatedly rejected the notion that the Clause leaves room for any "public policy" exception to judgments.[11] Indeed, the Court recently reiterated that the "full faith and credit clause requires a state court . . . to enforce a judgment recovered in another state, although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy." *Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990) (quotations omitted). *Accord Roche v. McDonald*, 275 U.S. 449, 452 (1928) (a "judgment, if valid where rendered, must be enforced [by another] State although repugnant to its own statutes"); *Kenney v. Supreme Lodge*, 252 U.S. 411, 414-15 (1920) (same).[12]

The reasons for the Court's consistent refusal to recognize any policy exception are clear: ensuring that the command of full faith and credit overcomes the parochial policy interests of different States is vital for securing the Clause's central

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[11] There are only two narrow situations, in fact, in which the Court has held that a State may not be obliged to give full effect to a valid judgment from another State: judgments based on penal laws, *see, e.g., Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888), and judgments purporting directly to affect title to land in another state, *see, e.g., Olmsted v. Olmsted*, 216 U.S. 386, 393-94 (1910). Neither exception is relevant to this case.

[12] *See also Restatement (Second) of Conflict of Laws* § 117 cmt. b (1971) ("[F]ull faith and credit requires that [a valid judgment] be recognized and enforced in a sister State even though the original claim is contrary to the strong public policy of the sister State."); Hon. Ruth Bader Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 Harv. L. Rev. 798, 805 n.35 (1969) ("The Supreme Court has consistently held that a state may not, by reason of its own social or economic policy, refuse to recognize a sister state's judgment. State policy must yield to the federal policy requiring uniform judgment recognition throughout the nation.").

objective. The very "*function* of the Full Faith and Credit Clause is to resolve controversies *where state policies differ*." *Morris v. Jones*, 329 U.S. 545, 553 (1947) (emphasis added). And the resolution of such conflicts demanded by the Framers in the Clause, and by Congress in the Statute, is that a judgment rendered in one State must be given full effect throughout the Nation, without regard to the preferences of other States. Any other rule would unravel the bond imposed by the Clause for "weld[ing] the independent states into a nation," and defeat its objective of ensuring that a right, once established by a judgment, would be enforceable nationwide. *Johnson*, 340 U.S. at 584. Instead, States would always be free to invent reasons for declining to give effect to judgments from other States. Enforcing the Clause in the face of such policy claims is thus essential, for "if full faith and credit is not given in that situation, the Clause and the statute fail where their need is the greatest." *Morris*, 329 U.S. at 553.[13]

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[13] An important distinction is made between cases concerning full faith and credit for *judgments* and for *statutes*. While the Court has recognized that, in the choice-of-law context, a State need not apply another State's *statutes* in violation of its public policy, *see, e.g.*, *Nevada v. Hall*, 440 U.S. 410, 422 (1978), that rule explicitly rests on unique concerns raised "in the case of statutes." *Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 501 (1939). In such cases, barring any exception "would lead to the absurd result that . . . the statute of each state must be enforced in the courts of the other, but cannot be in its own." *Id.* In light of such concerns, the Court has permitted a policy exception for statutes in part because -- unlike the situation with judgments -- "Congress has not prescribed" the "extrastate effect" of statutes. *Id.* at 502; *see also Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 547 (1935). Such decisions have no application where the Clause is applied to judgments. *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.10 (1981) (plurality) (noting that "[d]ifferent considerations are of course at issue . . . outside the choice-of-law area, such as in the case of sister state-court judgments").

B. Petitioners' Claim for an Exception Based on the "Institutional Integrity" of Courts Is Baseless.

Apparently recognizing the futility of a frontal attack on the settled principle that there is no policy exception to the command of full faith and credit for judgments, petitioners repackage their argument as a claim for a "narrower" exception protecting "the integrity of judicial proceedings." Petrs. Br. 18. Relabeling does not aid petitioners' cause, and in any event, their appeals to judicial integrity are meritless.

1. Petitioners' Appeal to the "Institutional Integrity" of Courts Is Simply a Plea for a Public Policy Exception Under a New Label.

Petitioners claim that they are not advocating an exception based on "*substantive* policy," but rather only a "narrower" exception based on the forum State's "interest in the integrity of its judicial proceedings." Petrs. Br. 18 n.8 (emphasis added). This purported distinction, however, is illusory. A State's interest in controlling judicial proceedings is but one example of the limitless array of policy concerns that might be advanced to frustrate the Full Faith and Credit Clause.

Indeed, this particular policy interest is one that could *always* be invoked against the Clause. Enforcing the dictates of full faith and credit *necessarily* requires some interference with a forum State's control over its own judicial processes. The very purpose of the Clause is to ensure that the courts of the several States will not operate purely as the courts of wholly independent sovereigns, free to ignore each other's judgments, but rather more as integrated components of a unified judicial system. The Clause thus requires States both to permit actions in their courts brought upon another State's judgments, *see, e.g.*, *Kenney*, 252 U.S. at 415 ("[A] State cannot escape its constitutional obligations by the simple device of denying jurisdiction . . . to Courts otherwise competent."), and to dismiss proceedings instituted in their courts that would attempt

to relitigate matters already adjudicated elsewhere, *see, e.g.*, *Underwriters Nat'l Assurance Co. v. North Carolina Life*, 455 U.S. 691, 705-10, 715 (1982).[14]

Petitioners' effort to cloak their "public policy" exception in the guise of a distinct concern for the "institutional" interests of courts is hardly novel; indeed, it has been previously rebuffed by this Court. In *Morris v. Jones*, the Court confronted a similar claim that a Missouri judgment should not be afforded full faith and credit because it would improperly interfere with the "convenience in administration" of ongoing liquidation proceedings in Illinois courts. 329 U.S. at 553. Recognizing that such a claim was "at best only another illustration of how the enforcement of a judgment of one State in another State may run counter to the latter's policies," the Court flatly rejected it, reaffirming that, on this point, "the answer given by *Fauntleroy v. Lum* is conclusive." *Id.* (citation omitted).

Because the Court has consistently rejected any claims for policy exceptions to the Clause, it is not surprising that petitioners' discussion on this point is virtually barren of authority. The simple fact is that *no case* from this Court

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[14] Remarkably, petitioners suggest that it would unthinkable if, through the Clause's operation, one State could "commandeer" the "official processes" of another. Petrs. Br. 24. But the Clause's central function is *precisely* to require the courts of every State to respect rights established by a judgment in another State, which is the reciprocal obligation for ensuring that their own judgments will be given the same respect elsewhere. Indeed, as this Court made plain in *Fauntleroy*, the overarching imperative of full faith and credit is so central to the constitutional plan that it compels the courts of one State to enforce a judgment even if those courts would have held the right claimed in the original lawsuit to be entirely beyond the protection of their laws. *See* 210 U.S. at 236-67; *see also Kenney*, 252 U.S. at 414-15.

establishes their far-reaching brand of a "public policy" exception protecting the "institutional interests" of courts.[15]

Finally, it is clear that petitioners' supposedly "narrow" principle is so infinitely malleable that it could be used to eliminate entirely full faith and credit for injunctions. Under petitioners' theory, the "intrusive imposition on the judicial process" involved in enforcing any injunction is apparently enough in itself to warrant a blanket exemption for all injunctions from the Clause. Petrs. Br. 25. If petitioners' new exception can accomplish that ambitious result, there is no limiting principle that would prevent States from resorting to it whenever they found it undesirable to enforce a judgment from another State.

2. The Integrity of Judicial Proceedings Is Not Threatened Here.

In any event, enforcing the Michigan injunction in no way threatens the "institutional integrity" of any judicial proceedings. All manner of actions by courts -- including the determination of issues that are given *res judicata* effect, the disbarment of an attorney, or the imprisonment of a witness or party -- may have an *impact* on a proceeding in another court. But such actions have never been thought to threaten the "institutional integrity"

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[15] Virtually the only authority petitioners cite in support of this open-ended exception is section 103 of the *Restatement (Second) of Conflict of Laws*. *See* Petrs. Br. 24 n.17, 26-27. Section 103, however, is one of the most controversial sections in the *Restatement*. It has been roundly criticized for purporting to describe an exception that does not exist. *See, e.g.*, Ronald Hecker, *Full Faith and Credit to Judgments: Law and Reason Versus the Restatement Second*, 54 Calif. L. Rev. 282, 282 (1966) (explaining that the draft from which section 103 derived "is not supported by the . . . decisions on which it is founded" and that "its departure from precedent and inconsistency with constitutional policy cannot be justified"); William Reynolds, *The Iron Law of Full Faith and Credit*, 53 Md. L. Rev. 412, 438 (1994) ("[I]t is quite doubtful that Section 103 provides an accurate statement of the law.").

of the second court. In this case, in particular, precluding a single witness -- particularly a paid witness -- from testifying does not undermine the "institutional integrity" of the District Court in the least.

In this regard, petitioners' reliance on the unresolved status of anti-suit injunctions under the Full Faith and Credit Clause is wholly misplaced. Such injunctions implicate the purposes underlying the Clause in a way that the Michigan injunction does not. By demanding equal respect for all state judgments, the Constitution directs each State to presume that every other State's courts are equally capable of dispensing justice. An anti-suit injunction, however, may imply that another State's courts cannot be trusted and must be stopped by a preemptive strike before they enter a judgment that will trigger the Clause's protections. Such an injunction is thus an end-run around the very principles of mutual respect and recognition that the Clause was designed to vindicate.

Even assuming *arguendo* that an anti-suit injunction would not necessarily be entitled to full faith and credit,[16] however, it does not follow -- and much less does it follow *a fortiori* -- that the Michigan injunction should be denied the protection of the Clause because of its incidental effect in making a particular witness unavailable. Petrs. Br. 27. Even if one court may not be able *completely* to ban proceedings in another court, that rule says nothing about full faith and credit for a judgment that happens to affect the availability of only a single witness.

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[16] Contrary to petitioners' suggestions, the law on anti-suit injunctions is far from unequivocal. This Court has explicitly held that it is consistent with the command of full faith and credit for a state court to enjoin an individual from bringing a suit in another State. *See Cole v. Cunningham*, 133 U.S. 107, 117-19 (1890). And some courts have long held that in certain circumstances such orders may be enforced under the Clause. *See Dobson v. Pearce*, 12 N.Y. 156, 166-67, 170 (1854).

For similar reasons, *Donovan v. City of Dallas*, 377 U.S. 408 (1964), does not aid petitioners. There, the Court held only that a state court may not directly "enjoin litigants from prosecuting their federal-court action." *Id.* at 411. Once again, that ruling has nothing to do with the incidental effect that the Michigan injunction may have in upsetting petitioners' desire to present specific testimony from a single witness. The injunction here has in no way enjoined the prosecution of petitioners' federal action, which will proceed regardless of whether Elwell testifies. Petitioners' attempt to collapse this case into *Donovan* thus makes no sense. And their suggestion that giving the Michigan injunction full faith and credit will mean that state courts soon will be dictating which claims can be raised in federal courts is mere lawyers' hyperbole.

C. Petitioners' Other Naked Appeals to Policy Distort the Implications of Full Faith and Credit.

Unable to establish any basis in precedent for an exception, petitioners ultimately resort to a parade of horribles. Yet this Court's settled decisions rain out the parade. Indeed, if the Court's numerous decisions rejecting a public policy exception mean anything, they mean that facial appeals to policy *cannot* justify evading the constitutional command.

Petitioners also grossly distort the true implications of full faith and credit for the Michigan injunction, claiming that it would allow "wrongdoers [to] purchase the silence of whistleblowers," Petrs. Br. 23, and that the "public" would be deprived of access to "every man's evidence," *id.* at 18-19. But petitioners' lurid images of Big Business corrupting the nation's court systems with back-room deals are both wrong and irrelevant. They serve only to cloud the issues before the Court while casually denigrating the integrity of state courts across the country.

1. Petitioners' Exaggerated Fears of "Buying Silence" Rest on the Insulting Suggestion that Injunctions Are Up for Sale.

Petitioners' first attack flagrantly distorts the facts. Their insistence that General Motors has "purchase[d]" Elwell's "silence," Petrs. Br. 19, ignores reality and is a direct affront to the Michigan courts. Although Elwell's lawsuit was settled, the permanent injunction entered by the Michigan Circuit Court is manifestly *not* a private agreement. It is the final judgment of a court of law entered in a valid proceeding, and this Court has squarely held that such a consent decree is entitled to full faith and credit. *See Matsushita*, 116 S. Ct. at 877; *cf. Trendell v. Solomon*, 443 N.W.2d 509, 511 (Mich. Ct. App. 1989) (consent judgment is "a judicial act and possesses the same force and character as a judgment rendered following contested trial or motion"). Petitioners suggest that General Motors and Elwell walked into court asking for an injunction with only their own bargain to support its terms, but nothing could be further from the truth.

General Motors' counterclaims against Elwell in the Michigan suit asserted a legal entitlement to prevent him from divulging confidential information protected by the attorney-client privilege, the work-product doctrine, and trade secret law. At a two-day evidentiary hearing, General Motors proved that Elwell had pervasive access to such information during his 18 years as an in-house litigation consultant, and that he had already shown complete disregard for his fiduciary duty to protect General Motors' privileges. On the basis of this evidence, the court explicitly found that General Motors was likely to succeed on the merits, that a preliminary injunction was required to prevent irreparable harm, and that public policy favored its issuance. J.A. 10.

After the case was settled, the court entered a permanent injunction as a consent decree only after expressly determining

that General Motors "met the requirements for injunctive relief." J.A. 30. The court based its determination on the entire record, including the transcripts from the two-day evidentiary hearing, the factual findings supporting the preliminary injunction, and the parties' stipulations. *Id.* Indeed, the court again specified that General Motors had "met its burden in establishing that if [Elwell] disclosed various forms of privileged information he possesses [General Motors] would be irreparably harmed" and that "the public interest weighs in favor of granting a permanent injunction" barring Elwell from testifying against General Motors without its consent *Id.*

A key factor supporting the injunction was Elwell's inability to provide any assurance that he could voluntarily protect General Motors' privileged information. Elwell stipulated that after 18 years of working closely with lawyers in preparing cases for trial, "*it [is] extremely difficult for [him] to determine whether his knowledge with respect to GM only comes from attorney-client and work product communications or from non-privileged communications.*" J.A. 13 (emphasis added). In this situation, an injunction barring Elwell from testifying against General Motors was the only possible remedy that could adequately protect General Motors' legal rights.[17] Indeed, in similar circumstances, other courts have upheld contested injunctions imposing the exact same terms. *See, e.g., American Motors Corp. v. Huffstutler*, 575 N.E.2d 116, 119-20 (Ohio 1991).

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[17] General Motors could not adequately protect its privileges merely by interjecting objections at trials or depositions. If *Elwell himself* cannot discern when or even whether his testimony is revealing information that he learned only from privileged materials, it is impossible for an attorney unfamiliar with the entire range of privileged materials that Elwell consulted during his career to make that determination and interpose a timely objection. Instead, General Motors' attorneys would only be able to object to questions that facially delve into privileged areas. Thus, petitioners' "commitment" not to seek privileged or confidential information from Elwell, Pet. App. 22a, is worthless.

Contrary to petitioners' overstated claims, according full faith and credit here will in no way open the floodgates for employers to start striking private deals for "silencing" witnesses and having them enshrined in court orders. The insulting premise behind these claims is that any litigant can "buy" an injunction from a state court at any time, whether or not there is any legal basis for the order. To the contrary, litigants who settle their disputes can obtain further protection from the courts only if they assert a valid and legally protected interest. That is why the Michigan court reviewed the entire record to determine whether General Motors had "met the requirements for permanent injunctive relief." J.A. 30. It is thus clear that, while petitioners purport to be defending the "institutional integrity" of state courts, their dire allegations actually rest on a decidedly jaundiced view of the very courts they are supposedly championing.[18]

2. Appeals to the Public's Right to "Every Man's Evidence" Have Nothing to Do with Elwell.

Petitioners also claim that according full faith and credit to the Michigan injunction will undermine the public's interest in securing "every man's evidence." Petrs. Br. 18-19. But this claim ignores the foundation of the injunction, which was issued to protect *privileged* information. *See* J.A. 30 (consent decree); *id.* at 12-17 (stipulations); *id.* at 9-10 (preliminary injunction); *id.* at 18-28 (affidavit describing Elwell's misconduct). While it may be an "ancient proposition of law" that the government has power to compel testimony from its citizens, Petrs. Br. 18,

[18] In the same vein, petitioners' citation of various whistleblower statutes enacted to protect employees who risk their jobs to report violations of the law committed by their employers, *see* Petrs. Br. 20 & n.10, has nothing in common with Elwell, who has established a lucrative consulting business selling his services to any and all bidders for $300 per hour in direct defiance of the agreement he executed in court and the binding terms of the Michigan injunction. *See supra* pages 6-8.

it is also settled that this power has always been constrained by testimonial "privileges against forced disclosure." *United States v. Nixon*, 418 U.S. 683, 709-10 (1974). As this Court has explained, "the public . . . has a right to every man's evidence, *except for those persons protected by a constitutional, common-law, or statutory privilege.*" *Id.* at 709 (emphasis added).

Indeed, such privileges, particularly the attorney-client privilege, have an equally venerable pedigree. As this Court has recognized, "[t]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As early as the reign of Elizabeth I, it was treated as "unquestioned." 8 WIGMORE ON EVIDENCE § 2290, at 542 (McNaughton rev. ed. 1961) (citing *Berd v. Lovelace*, 21 Eng. Rep. 33 (Ch. 1577)). Notwithstanding petitioners' strident claims, rigorous enforcement of the attorney-client privilege has long been deemed to "promote broader public interests in the . . . administration of justice," *Upjohn*, 449 U.S. at 389, even though it limits the information placed before a court.[19]

Petitioners' breathless exclamation that full faith and credit conflicts here with the public's "right" to evidence thus ignores the fact that the protection of privileged information was the basis of the judicial order barring Elwell from testifying. Petitioners embellish their appeal to "every man's evidence" with a rhetorical flourish suggesting that General Motors "purported to purchase" what "was not Elwell's to sell," Petrs. Br. 19, but *precisely the opposite is true*. It is *Elwell* who is attempting to profit by selling to *plaintiffs* across the country

[19] *See also Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (attorney-client privilege is "founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

something that is not *his* to sell: testimony that is pervasively and uncontrollably leavened with General Motors' privileged information.

The nature of Elwell's testimony, in fact, highlights yet another reason why petitioners' appeal to "every man's evidence" rings particularly hollow. Elwell knows nothing about the particular facts of any case in which he testifies against General Motors. Instead, petitioners seek to have him testify because they view him as "an expert on GM fuel systems," including "design history [and] fuel system safety." Pet. App. 22a. The so-called "right" of access to evidence, however, plainly concerns only percipient fact testimony; it has nothing to do with witnesses, like Elwell, who may have expertise that a litigant might find useful.

3. Petitioners' Collateral Attacks on the Merits of the Injunction Are Impermissible.

The flawed premise underlying petitioners' policy arguments is that the Michigan injunction sweeps too broadly because there is some neatly separable body of *non-privileged* information in Elwell's possession about which he should be permitted to testify. But petitioners cannot assume away Elwell's own admissions. Where Elwell has conceded that *even he* finds it virtually impossible to tell when or even whether he is revealing information from privileged sources, *see* J.A. 13, the injunction entered by the Michigan court was entirely proper -- no lesser remedy could suffice to protect General Motors against the prospect of irreparable harm, *see id.* at 30.[20]

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[20] In this respect, the effect of the Michigan injunction is similar to government regulations that routinely prohibit current and former employees from testifying as expert or opinion witnesses in private litigation "with regard to any matter arising out of the employee's official duties or the functions of the Department [of Transportation]." 49 C.F.R. §§ 9.7(b) & 9.9(c) (1996); *see also* 58 Fed. Reg. 6719 (Feb. 2, 1993).

More importantly, petitioners' efforts to explain why they think the injunction was not properly tailored are irrelevant for one pivotal reason: the United States District Court for the Western District of Missouri is *not* the Michigan Court of Appeals. The function of the Full Faith and Credit Clause is to preclude federal and state courts from entertaining the sort of collateral attacks that petitioners have advanced here. *See, e.g., Underwriters*, 455 U.S. at 709 & n.16; *cf. District of Columbia Ct. App. v. Feldman*, 460 U.S. 462, 482 (1983) (federal district courts are without jurisdiction to entertain collateral attacks on state court judgment); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923) (same).

If petitioners believe the injunction is overbroad, they are free to go to the issuing court in Michigan to press their arguments for access to Elwell's testimony (and to appeal any adverse ruling). Their failure to follow that course, however, gives them no license to claim that the District Court should ignore the dictates of full faith and credit and entertain their collateral attack upon the Michigan judgment.

Indeed, petitioners' policy arguments aptly demonstrate why the Clause precludes a second forum from entertaining such collateral attacks. The parties here harbor radically different views of the facts underlying the Michigan judgment. Petitioners believe that Elwell can and will protect privileged information, that the injunction is overbroad, and that General Motors effectively "purchased" Elwell's "silence." The record from the Michigan proceedings, however, establishes that Elwell will not (and cannot) distinguish between privileged and non-privileged information, that the injunction is vital to protect General Motors' privileges, and that the parties settled the case

in recognition that the injunction was appropriate and the monetary terms were fair.[21]

The Michigan court that issued the injunction is best placed to resolve these competing views. *And that is precisely why petitioners want to avoid bringing their claims to that court.* They perceive that they have a much better chance of upsetting the injunction if they can make unsubstantiated allegations in a second forum that has never heard the evidence. The very purpose of the Full Faith and Credit Clause, however, is to prohibit such end-runs. *See, e.g., Underwriters*, 455 U.S. at 715 (explaining that the Clause was "designed to prevent" "two state courts from reaching mutually inconsistent judgments on the same issue").

IV. ACCORDING FULL FAITH AND CREDIT TO THE MICHIGAN INJUNCTION DOES NOT VIOLATE DUE PROCESS.

What petitioners now label their "primary" argument is properly treated last because it is, in reality, an eleventh-hour diversion – as evidenced by the fact that petitioners never even bothered to raise this claim until their unsuccessful petition for rehearing in the Court of Appeals.[22] Under this theory, petitioners now claim that it would violate the Due Process Clause to accord full faith and credit to the Michigan injunction because they were not parties to that litigation. *See* Petrs. Br. 12-18. One need only scratch the surface of this new claim to discern its lack of merit. Indeed, it suffers from three critical

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[21] The District Court below has no knowledge of these background facts, which entirely refute petitioners' unsubstantiated characterization of the events underlying the Michigan injunction.

[22] Under Eighth Circuit law, that was "far too late in the day for [petitioners] to raise [a] new claim of error." *Jamestown Farmers Elevator, Inc. v. General Mills, Inc.*, 552 F.2d 1285, 1296 (8th Cir. 1977).

errors, each of which would have been exposed if the claim had been tested below.

A. Precluding Petitioners' Claims to Elwell's Testimony Would Not Violate Due Process.

Petitioners' exaggerated due process claims are flawed from the outset for the simple reason that petitioners do not have any sufficiently substantial "liberty" or "property" interest in obtaining the testimony of a single witness -- particularly a paid expert such as Elwell -- to trigger formal due process protection even if affording the injunction full faith and credit would mean foreclosing their hope to have Elwell testify.

It is axiomatic that due process protections are triggered only upon a deprivation of a protected interest in life, liberty, or property. *See, e.g., Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Petitioners' claimed interest in obtaining Elwell's testimony implicates no interest in life or liberty, and thus the only question is whether the Court should recognize a brand-new property interest in securing a particular witness's testimony.

The cases on which petitioners rely, however, do not remotely establish any such novel category of property interest. Petitioners cite cases in the line of *Martin v. Wilks*, 490 U.S. 755 (1989), for the commonplace rule that a person may not be bound by a judgment *in personam* in a case to which he was not made a party. *See* Petrs. Br. 12-15. But in *Wilks*, the Court held only that a group of white firefighters could not have the merits of a cause of action for employment discrimination foreclosed by a consent decree in litigation between others. *See* 490 U.S. at 761-63. Although the Court encapsulated the result by saying that the consent decree could not "conclude the rights of strangers," *id.* at 762, the only "right" at issue was a cause of action. Indeed, in all of these cases, the essential concern relates to the elimination of a cause of action, which petitioners recognize is a property interest protected under the

Due Process Clause. *See* Petrs. Br. 16 n.7 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)).

Petitioners cannot lay claim to that rule, however, because they are not being deprived of their cause of action. Even if giving the injunction full faith and credit meant foreclosing petitioners' access to Elwell, the "deprivation" would consist only of one witness's testimony. Nothing in *Wilks* or any other case cited by petitioners remotely suggests that *that* "interest" must receive the same solicitude as a constitutionally protected property interest in a cause of action.[23]

Indeed, recognizing that this case is a far cry from *Wilks*, petitioners strain to assert that enforcing the injunction would actually foreclose two distinct interests -- both their interest in obtaining Elwell's testimony and their interest in pursuing their "claim of liability" against General Motors. Petrs. Br. 16. Despite petitioners' contrived claims, however, depriving a litigant of a single potential witness is not tantamount to foreclosing a cause of action. Indeed, petitioners' efforts to equate access to Elwell with their very ability to maintain their action are particularly bold, since Elwell has no knowledge about the particular facts of petitioners' case -- far less any unique knowledge. The testimony petitioners elicited from him in the first trial primarily concerned his opinions about the principles of gasoline combustion and the design of General Motors' fuel systems -- testimony based entirely on his work as an in-house litigation consultant. *See* Pet. App. 22a; J.A. 19-22. *See also* Tr. 388-397.[24] In short, petitioners' suggestion that

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[23] *Wilks* itself, in fact, did not explicitly rest on a due process holding; instead, it concerned only the proper interpretation of Rules 19 and 24 of the Federal Rules of Civil Procedure.

[24] One of petitioners' *amici* also unintentionally acknowledges that Elwell's testimony is not unique; he is only one of a "number of persons who can testify (continued...)

their right to pursue their action is somehow inseparable from their ability to obtain Elwell's testimony is nothing but a transparent attempt to bootstrap an unprotected *desire* to have Elwell testify into a *property interest* that might come within the rule of *Wilks*.

In reality, the *only* interest at stake here is petitioner's hope that Elwell will testify. But civil litigants do not have a due process right to testimony from particular witnesses; instead, they are routinely prevented from presenting exactly the witnesses they would prefer. Whenever a potential witness is retained by the opposition, or a willing witness is unavailable on the trial dates, or an unwilling witness is outside the subpoena power of a court, a party may simply be unable to obtain the desired testimony from that witness. In certain instances, this omission may even prove fatal to that party's action. Yet requiring a party to litigate a case without being able to present all the witnesses it wanted has never been thought to violate the Due Process Clause. In fact, petitioners' claims would turn the Constitution on its head, for it is only in the criminal context that the Framers guaranteed, in the Sixth Amendment, the right to compulsory process for obtaining witnesses. *See* U.S. CONST. amend. VI, cl. 4.

The Court has made it clear that the mere existence of rules generally providing for discovery or access to potential evidence does not create a distinct property interest protected by due process. In *United States v. Augenblick*, 393 U.S. 348 (1969), for example, the defendant in a court martial claimed that he had

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[24] (...continued)
with expertise on the design of the GM fuel pump system," Brief of Ass'n of Trial Lawyers of Am. 3-4, including other General Motors engineers who were available to be deposed in this case. Moreover, as the defense verdict in the recent *Stephens* case attests, Elwell's testimony is hardly indispensable in proving plaintiffs' products liability claims against General Motors. *See supra* pages 8-9.

been denied due process by the government's failure to turn over a tape recording of his statements, which it was required to do under the Jencks Act, 18 U.S.C. § 3500. This Court cautioned that, even though this statutory infraction had deprived the defendant of access to the evidence, it was error for the claim of a right of access to particular evidence to be "elevated to a constitutional level" and deemed a violation of the Due Process Clause. *Id.* at 356. To the contrary, such an infraction would rise to a due process violation only where it produced, overall, a "constitutionally unfair trial" -- that is, a trial "where the barriers and safeguards are so forgotten that the proceeding is more a spectacle or trial by ordeal than a disciplined contest." *Id.* (citations omitted).

The same basic principle is reflected throughout the law of *habeas corpus*. Although defendants frequently complain that they are denied due process by being forced to conduct their defense without particular testimony or evidence, courts have never suggested that the Due Process Clause protects a distinct interest in obtaining each piece of desired testimony. To the contrary, however erroneous an evidentiary decision may be, it will violate due process only where it "fatally infected [the] trial and deprived [the defendant] of fundamental fairness." *Turner v. Armontrout*, 845 F.2d 165, 170 (8th Cir.), *cert. denied*, 488 U.S. 928 (1988); *see also Maes v. Thomas*, 46 F.3d 979, 987 (10th Cir.) (on *habeas* review, evidentiary rulings raise no due process question unless the trial, as a whole, was rendered fundamentally unfair), *cert. denied*, 115 S. Ct. 1972 (1995).

Such decisions demonstrate that, while the Due Process Clause may protect an interest in a fundamentally fair procedure for determining an overall cause of action, it does not transform every evidentiary quarrel into a constitutional claim. Indeed, it is clear that adopting petitioners' radical assertion of a protected "property interest" would involve this Court in endless micromanagement of state court litigation.

In the end, accepting petitioners' due process claim would expand *Wilks* beyond all recognizable bounds and effectively abandon any limits on the type of interests afforded due process protections. Behind petitioners' argument is the insupportable claim that they are "bound" by a judgment in violation of due process whenever a judgment has *any* collateral impact on them. Petitioners even make that claim explicit, asserting that "a judgment cannot *affect* a stranger to the original lawsuit without violating procedural due process." Petrs. Br. 15 (emphasis added; quotation omitted). That is plainly not the law, however, for the only party being "bound" to the injunction is Elwell, and holding him to his legal obligations does not violate anyone's due process rights.

A judgment in one case obviously can *affect* others in innumerable ways without raising due process concerns. If a court sentences a criminal defendant to a prison term, the convict will likely be unavailable as a witness. Yet no one would argue that a litigant seeking testimony would have a due process right to contest the conviction and sentence. So too, if one creditor obtains a judgment against a corporation with a limited pool of assets, that judgment might adversely affect all other creditors. Yet the other creditors would have no right to relitigate that distinct judgment. *See, e.g., Morris v. Jones*, 329 U.S. 545 (1947). Nevertheless, that is precisely the result that would flow from petitioners' expansive view of the "interests" to which due process protection attaches.

To buttress their proposed due process right, petitioners dredge up a single inapposite case -- *Ex parte Uppercu*, 239 U.S. 435 (1915). In *Uppercu*, the Court held only that a trial court had no authority to seal the record and depositions in a case and to bar access to them by later litigants where "*[n]either the parties to the original cause nor the deponents have any privilege.*" *Id.* at 440 (emphasis added). The only holding was thus that it was improper to bar access to the sealed material when there was no basis for the sealing order.

To the extent the Court suggested some "right" of access to the material, it plainly was referring only to the "general principle," *id.* at 439, now widely accepted, that litigants should be allowed discovery of relevant information. The Court expressly held, moreover, that such a "right" exists only "unless some exception is shown." *Id.* at 440. Among these exceptions are the traditional privileges against disclosure, which the Court specifically noted were *absent* in that case. The holding in *Uppercu* thus says nothing about enforcing the Michigan injunction, which was entered to protect the attorney-client and other privileges.

Moreover, *Uppercu* was not a due process holding at all. The case involved a petition for mandamus and came within the Court's supervisory power to control discovery in the federal courts. *See* 239 U.S. at 438-41. If *Uppercu* had rested on a due process holding, it would have led to the absurd result that every ruling on a discovery question limiting access to potential evidence would raise a constitutional issue. In fact, that is precisely the result urged by petitioners here -- every fight over obtaining documents, presenting testimony, and claiming a privilege would become of constitutional magnitude.[25]

In any event, to the extent petitioners would distort *Uppercu* to establish some all-encompassing right of access to evidence, the case cannot support that bold proposition. The district courts have broad powers to enter protective orders, including sealing orders, for any reason amounting to "good cause." Fed. R. Civ. P. 26(c); *see, e.g., In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987). And even where a litigant in a subsequent case seeks access to such restricted materials, the proper course is to seek modification

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[25] The effect of this approach for federal *habeas* cases would be extraordinary, for every point of dissatisfaction about how the case was tried in state court would have to be evaluated as a constitutional claim -- a result that would be as unmanageable as it would be undesirable.

from the court that issued the order, which generally has broad discretion in deciding whether to modify. *See, e.g., United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427-28 (10th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991).

Thus, nothing in *Wilks*, *Uppercu*, or this Court's due process decisions supports petitioners' sweeping claims.

B. Even If Petitioners Had a Protected Interest in Elwell's Testimony, Enforcing Full Faith and Credit Here Does Not Violate Due Process.

Even if petitioners could establish a "right" to Elwell's testimony protected by the Due Process Clause, their belatedly contrived constitutional claim rests on a misunderstanding of the law. They incorrectly assume that honoring the commands of full faith and credit will deprive them of *any* opportunity to be heard on their challenge to the Michigan injunction. In jumping to that conclusion, however, petitioners never pause to analyze precisely what full faith and credit requires in this case.

Affording the injunction full faith and credit means giving it the *same* effect it would have in the courts of Michigan. In Michigan, the effect of the injunction on third parties such as petitioners is clear: it requires them to contest the injunction *in the court that issued it*. Only that court, under Michigan law, has power to modify or vacate the injunction. It is evident, however, that simply requiring petitioners to abide by that orderly procedure and present their arguments to the Michigan court does not violate due process.

1. Full Faith and Credit Merely Requires Petitioners to Proceed in the Michigan Court.

By assuming that full faith and credit would bar them from challenging the Michigan injunction, petitioners misunderstand the nature of that command. In implementing the Full Faith and Credit Clause, Congress has directed that state judgments are to be given "the same full faith and credit" as they have "by law

or usage in the courts of [the] State . . . from which they are taken." 28 U.S.C. § 1738. The Court long ago settled that this unambiguous command makes the local laws of the rendering State the measure of full faith and credit and requires that a judgment be given "the same *credit, validity and effect*, in every other court of the United States, which it had in the state where it was pronounced." *Hampton*, 16 U.S. (3 Wheat.) at 235 (emphasis added).

The Court has recently reiterated that this command demands in the broadest terms that a judgment be given everywhere the "*same respect* that it would receive in the courts of the rendering state." *Matsushita*, 116 S. Ct. at 877 (emphasis added). As a result, other courts "may not employ their own rules . . . in determining the effect of state judgments, but must accept the rules chosen by the State from which the judgment is taken." *Id.* (quotation omitted).[26]

Here, Michigan law clearly establishes the effect that an injunction has on third parties such as petitioners. In Michigan, no trial court other than the one that entered the injunction has the authority to alter or modify it. *See* Mich. Ct. R. 2.613(B) (a "judgment or order" may be set aside or vacated "only by the judge who entered the judgment or order, unless that judge is absent or unable to act"). The Michigan rule, in fact, is

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[26] The cases cited by petitioners denying full faith and credit to judgments rendered without jurisdiction, *see* Petrs. Br. 13-14, fit comfortably within this framework, for a judgment "rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere." *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 291 (1980); *see also Underwriters*, 455 U.S. at 704 n.10 ("One State's refusal to enforce a judgment rendered in another State when the judgment is void for lack of jurisdiction merely gives to that judgment the same 'credit, validity, and effect' that it would receive in a court of the rendering State."). The difference here, of course, is that the Michigan injunction is *not* void *ab initio*; instead, it is a valid, binding order entered by a court with proper jurisdiction over the parties before it.

particularly salient in the circumstances here, since "[t]he policy behind the rule requiring litigants to appear before the judge who made the judgment or order is that *the original judge is best qualified to rule on the matter*." *Huber v. Frankenmuth Mut. Ins. Co.*, 408 N.W.2d 505, 508 (Mich. Ct. App. 1987) (emphasis added). Moreover, the rule serves the salutary goal of "preserv[ing] the dignity and stability of judicial action" by "preventing 'judge shopping.'" *Id.*; *see also Palmer v. Kleiner*, 210 N.W. 332, 333 (Mich. 1915) (explaining that the statutory antecedents of this rule also served "to guard against a confusion of conflicting orders or decrees"). Under Michigan law, therefore, if a third party in petitioners' position wished to have Elwell testify in another Michigan court, that court would not be authorized to compel his testimony. Instead, the second court would require the requesting party to return to the court that entered the injunction to press his or her claim there. *See, e.g., Berar Enters., Inc. v. Harmon*, 300 N.W.2d 519, 523-25 (Mich. Ct. App. 1980) (holding that a second judge lacked jurisdiction to modify a consent decree where the first judge was not "absent or unable to act").

Indeed, on two separate occasions, other Michigan trial courts have reached this exact result in connection with the injunction entered against Elwell. The plaintiffs in two different actions against General Motors have asked *other* Michigan courts, in effect, to modify the permanent injunction by ordering Elwell to testify. In each case, General Motors argued that, under Rule 2.613(B), only the judge that entered the injunction has proper authority to alter the obligations imposed on Elwell. In each case, the other Michigan court declined to upset the injunction, concluding instead that the plaintiffs' proper avenue for relief lay in the issuing court. *See Brisboy* Order and Transcript (Appendix D); *McLain* Order (Appendix E) (noting that "Plaintiff clearly asks this Court to ignore the plain meaning of the August 1992 Permanent Injunction"). Thus, decisions

addressing *this very injunction* have settled its minimal and reasonable effect on third parties in the Michigan courts.

Under the Full Faith and Credit Statute, according the "same full faith and credit" to the Michigan injunction in this case as it has "by law or usage" in the Michigan courts, 28 U.S.C. § 1738, simply means requiring petitioners to go back to the Michigan court that issued the injunction to raise their claims for having Elwell testify. *See Johnson*, 340 U.S. at 587 (full faith and credit bars a collateral attack on an out-of-state decree "where the party attacking would not be permitted to make a collateral attack in the courts of the granting state").[27]

2. Requiring Petitioners to Press Their Challenge in Michigan Does Not Violate Due Process.

Once the consequences of affording full faith and credit to the Michigan injunction are correctly understood, it is

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[27] Contrary to the claims petitioners advanced below, moreover, the mere fact that the issuing court in Michigan has the power to modify the injunction does not give the District Court the same power. The District Court would plainly not be affording the injunction the "same respect that it would receive in the courts of the rendering state," *Matsushita*, 116 S. Ct. at 877, if it were to arrogate to itself a power that the other Michigan courts recognize as vested exclusively in the issuing court.

This Court's decisions on the "peculiar status" of child custody decrees, *Thompson v. Thompson*, 484 U.S. 174, 180 (1988), are not to the contrary. The leading decision of *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947), established only that where a custody decree can be revisited by any court in its home State, the courts of a second State should be equally able to modify the decree. *Id.* at 613 (noting "the custody decrees of Florida courts are ordinarily not *res judicata* either in Florida or elsewhere"). The Court thus explicitly rested on the "narrow ground" that "a judgment has no constitutional claim to a *more conclusive* or final effect in the State of the forum than it has in the State where rendered." *Id.* at 614-15 (emphasis added). Decisions like *Halvey* in no way suggest that where, as here, a State *does* give conclusive effect to an injunction entered by one of its courts, and denies other courts within the State the power to modify its terms, a judgment issued on that basis can be ignored elsewhere.

abundantly clear that petitioners do not have even a colorable due process argument. The cases on which petitioners rely holding that a judgment cannot "bind" persons who were not parties, *see, e.g.*, *Wilks*, 490 U.S. at 762; *Richards v. Jefferson County*, 116 S. Ct. 1761, 1765-66 (1996), are wholly irrelevant. Channeling petitioners' challenges to a particular forum does not "bind" them to a judgment or foreclose their opportunity to be heard. It merely requires them to raise their arguments under an orderly process established by Michigan law.

The Michigan rule, far from concluding any claimed "rights," acknowledges the unalterable fact that once a court with jurisdiction entered an injunction prohibiting Elwell from testifying, that obligation *on Elwell* changed the legal landscape in which petitioners were operating. After the injunction issued, the only way petitioners could have Elwell testify (short of violating the injunction) was to have the injunction altered. The Michigan rule simply requires petitioners to assert their claims in the forum best situated to grant or deny, in an orderly manner, the relief they (and others) may seek. It thus works no violation of due process, for it does not deny petitioners their opportunity to be heard; it just requires them to be heard in the Michigan court.[28]

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[28] To the extent petitioners might now attempt to claim that the Michigan courts will not afford them the process they believe is due, the short answer is that such a claim is impermissible. Without even attempting to pursue their remedy in Michigan, petitioners cannot assert a hypothetical lack of process in an effort to have another court ignore the command of full faith and credit by modifying the Michigan injunction. As this Court has emphasized, even minimal respect for state judicial processes "precludes any presumption that the state courts will not safeguard federal constitutional rights." *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982). Thus, as a threshold matter, full faith and credit requires petitioners to return to the issuing court in Michigan. If they then believe the process in that court is lacking, their proper remedy lies in direct appeal, with ultimate review available from this Court.

Nothing in the Court's decisions concerning the impact of consent decrees on third parties indicates that giving the injunction this forum-selection effect could possibly raise any due process concerns. To the contrary, the Court has noted approvingly that a consent decree entered between two parties will have *precisely* the effect of "channeling litigation" by any third parties back to the court that entered the decree. *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 523 n.13 (1986). Indeed, the Court explained that this approach promotes the same objective that is served by the Michigan rule -- avoiding "the risk of inconsistent or conflicting obligations." *Id.*; *cf. Palmer*, 210 N.W. at 333 (the "manifest purpose" of the Michigan rule is "to guard against a confusion of conflicting orders or decrees"). Indeed, in *Uppercu*, the case petitioners themselves showcase, the Court explained that where one court has sealed materials in a case and others seek access to them, "the orderly course is to obtain a remission of the command *from the source from which it came*." *Uppercu*, 239 U.S. at 440 (emphasis added). Far from trampling anyone's legitimate due process rights, such a channeling rule promotes the orderly resolution of disputes by ensuring that whenever third parties feel aggrieved by an outstanding court order, the competing concerns of *all* interested persons will be brought before the *same* court for adjustment.

In this case, moreover, it is also clear that there is no due process violation because of the marginal weight of the due process "interest" that petitioners assert. As this Court has repeatedly explained, due process does not have a "fixed content" but rather is "flexible and calls for such procedural protections as the particular situation demands." *Gilbert v. Homar*, 117 S. Ct. 1807, 1812 (1997). As described above, *see supra* Section IV.A, petitioners' purported "right" to procure Elwell's testimony does not warrant full-blown constitutional protection. Even if their claim did merit *some* due process protection, however, it would be unreasonable to contend that

requiring petitioners to go to a Michigan court to press their claims would somehow deny them whatever process is due. After all, *whenever* a potential witness is located outside the limits of a court's subpoena power, litigants hoping to secure that witness's testimony must proceed to the local courts where the witness can be found. *See, e.g.*, Fed. R. Civ. P. 45.

In this case, even without the Michigan injunction, if Elwell had not assisted petitioners by appearing in Missouri, they would have had to travel to New Mexico to seek a subpoena compelling him to appear for a deposition or trial, with no certain prospect of success. Since the standard process for enforcing the supposed "right" that petitioners assert often entails the burden of traveling to the local courts where a witness can be found, simply changing petitioners' destination by requiring them to press their claims in a Michigan court cannot possibly violate due process.

Indeed, petitioners' argument on this point has nothing to do with full faith and credit at all: if the Court were to hold that it violates due process to require petitioners to return to the court that issued the injunction, that would make the applicable Michigan rule of procedure equally unconstitutional *even as it applies within the State of Michigan*. It could hardly be argued that there is a difference of constitutional magnitude between (i) requiring third parties in Michigan who want Elwell's testimony to return to the issuing court and (ii) requiring petitioners here to return to that court. In each case, the injunction is given the same effect against non-parties: it determines the forum in which they can raise claims for access to Elwell's testimony. Petitioners' ambitious arguments thus would render Michigan Rule 2.613(B), as applied by the Michigan courts, unconstitutional. Indeed, they would establish a new rule of constitutional law that would prohibit *every* State from enforcing a salutary rule of procedure that merely channels

later litigation concerning an injunction -- whoever the parties may be -- back to the court that issued the original decree.[29]

C. Those in Active Concert to Violate an Injunction Can Be Bound Without Violating Due Process.

Finally, even if petitioners could assert a legitimate due process right (which they cannot), and even if the full faith and credit command denied them any opportunity to challenge the Michigan injunction (which it does not), and even if they were being held "bound" by the Michigan injunction (which they are not), there would still be no due process violation in this case because it is virtually certain that petitioners or their agents have acted in concert with Elwell to assist him in defying the Michigan injunction.

Under the governing rules, the Michigan injunction binds not only the parties to the action but also "*those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise*." Mich. Ct. R. 3.310(C)(4) (emphasis added). *Cf.* Fed. R. Civ. P. 65(d) (same). It is well settled that it does not violate due process for such persons to be held in contempt for aiding and abetting an enjoined party in violating the binding terms of an injunction, even though they were not parties to the underlying litigation. *See, e.g., Reich v. United States*, 239 F.2d 134, 137 (1st Cir. 1956) ("It has been settled law for a long time that one who knowingly aids, abets, assists, or acts in active concert with, a

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[29] In *Wilks* itself, the firefighters who were held not bound by the prior decree no doubt recognized that only the District Court that had entered the decree would be able to grant the relief they sought -- an injunction changing the terms of the decree -- and thus they brought their action before the same court. *See* 490 U.S. at 759-61. At bottom, petitioners are arguing that if the white firefighters in *Wilks* had brought their Title VII action in a different court, and that court had transferred the case back to the issuing court to ensure a more efficient and informed disposition, *the transfer would have violated the Due Process Clause*. Merely to frame the argument in this manner is to refute it.

person who has been enjoined in violating an injunction subjects himself to civil as well as criminal proceedings for contempt even though he was not named or served with process in the suit in which the injunction was issued"), *cert. denied*, 352 U.S. 1004 (1957).

In this case, following a pattern repeated across the country (but not in Michigan), Elwell appeared in Missouri and was served with a subpoena from the District Court "compelling" his deposition the next day. *See supra* pages 6-8. It is virtually certain that this occurred by prearrangement with petitioners' counsel, even though the injunction prohibits Elwell from "consulting with attorneys or their agents in any litigation [against General Motors]." J.A. 30. It is also virtually certain that petitioners' trial counsel were on actual notice of the Michigan injunction, especially in view of the extensive litigation that has surrounded it. Thus, even though petitioners and their agents were not parties in Michigan, in the circumstances here they almost certainly could be held directly bound to comply with the injunction under pain of contempt. *See Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13-14 (1945) (under Rule 65(d), "defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding").

The only reason the record is incomplete on these points is that petitioners did not raise their due process claim in a timely manner. For the reasons stated above, there should be no need for the Court to reach this far into petitioners' due process claims to dispose of this case. Even if the arguments above did not conclude the case in General Motors' favor, however, there can be no basis for *reversing* the judgment below under petitioners' brand-new theory, where the facts necessary to support their claims were never properly developed and examined below. General Motors respectfully suggests that rather than endorsing a constitutional theory that was hastily patched together on an inadequate record, the Court should

decline to address petitioners' new-found due process claim. *See, e.g., Matsushita*, 116 S. Ct. at 880 n.5 ("we generally do not address arguments that were not the basis for the decision below").

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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Attorneys for Respondent.

July 21, 1997

APPENDICES

APPENDIX A

United States District Court

FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

KENNETH BAKER and
STEVEN BAKER, by Next Friend,
MELISSA THOMAS
AIMEE SHOEMAKER and JESSICA
SHOEMAKER, by Next Friend,
AMANDA EMBREE
V.
GENERAL MOTORS
CORPORATION

SUBPOENA IN A CIVIL CASE

CASE NUMBER 91-0991-CV-W-8
CASE NUMBER 91-0990-CV-W-8

TO: Ronald Elwell
9713 Admiral Dewy N.E.
Albuquerque, NM 87111

☐ YOU ARE COMMANDED to appear in the United States District Court at the place, date and time specified below to testify in the above case

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☒ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case

PLACE OF TESTIMONY	DATE AND TIME
Judge John Maughmer's Courtroom US District Court - 211 U.S. Courthouse 811 Grand Avenue Kansas City, Missouri 64106	Wednesday June 23, 1993 9:00 a.m.

☐ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE OF TESTIMONY	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following at the date and time specified below.

PLACE OF TESTIMONY	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure. 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE June 22, 1993

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER
BRADLEY, LANGDON, BRADLEY, EMISON & ROSS
P.O. Box 130
Lexington, Missouri 64067 Attorneys for Plaintiffs (816) 259-2288

PROOF OF SERVICE		
SERVED	DATE 6/22/93 8:01 a.m.	PLACE Downtown Marriott Allio Plaza Hotel Kansas City, MO
SERVED ON (PRINT NAME) Ronald Elwell		MANNER OF SERVICE Personal by hand delivery
SERVED BY (PRINT NAME) Carter J. Ross		TITLE Attorney for Plaintiffs
DECLARATION OF SERVER		

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on 6/23/93
DATE

/s/ Carter J. Ross
SIGNATURE OF SERVER

8 South 10th Street, P.O. Box 130
ADDRESS OF SERVER

Lexington, MO 64067

APPENDIX B

SUPERIOR COURT OF CALIFORNIA
COUNTY OF STANISLAUS

MICHAEL D. STEPHENS and ROBERT A. STEPHENS, Plaintiffs vs. GENERAL MOTORS CORPORATION, Defendant.	))))))	No. 36740

Before the HONORABLE HURL W. JOHNSON, Judge,
Dept. C, Wednesday, May 21, 1997 9:28 A.M.

* * *

[Trial Transcript, pp. 3502-3503]

Q: Mr. Elwell. I think you were asked by -- or counsel mentioned at the beginning of his examination of you yesterday that he at least expected that he would pay your travel expenses to be here and to compensate you for -- I think you identified it as your loss of business opportunity.

At what rate do you charge for the loss of your business opportunity?

A: One eighth of what you charge.

MR. GREENFIELD: Your Honor, may I ask that be stricken?

THE COURT: It is stricken. Disregard it.

Do you have an hourly charge that's charged, sir?

THE WITNESS: I charge $300 hourly.

APPENDIX C

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF WAYNE

RONALD ELWELL,

Plaintiff,

v.

GENERAL MOTORS CORPORATION,
a Delaware corporation,
and WILLIAM CICHOWSKI,

Defendants.

91-115946 NZ 6/19/91
JDG: Richard P. Hathaway
ELWELL RONALD
VS.
GENERAL MOTORS CORP.

Courtney E. Morgan, Jr. (P29137)
Attorney for Plaintiff
1490 First National Building
Detroit, Michigan 48226

Charles C. DeWitt, Jr. (P26636)
Attorney for Defendants
400 Renaissance Center
Detroit, Michigan 48243

ORDER DENYING
PLAINTIFF'S MOTION REQUESTING
CLARIFICATION OF PERMANENT INJUNCTION

At a session of said Court held in the
City County Building, City of Detroit,
County of Wayne, State of Michigan,
on Nov. 2, 1992.

PRESENT: Honorable Richard P. Hathaway
Wayne Circuit Court Judge

Upon reading and filing of Plaintiff's Motion Requesting Clarification of Permanent Injunction, Defendants' Response, and for all the reasons stated on the sealed record in chambers on Thursday, October 22, 1992:

IT IS HEREBY ORDERED that Plaintiff's Motion Requesting Clarification of Permanent Injunction BE, and hereby is, DENIED.

RICHARD P. HATHAWAY
Hon. Richard P. Hathaway
Wayne Circuit Court Judge

APPENDIX D

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

CAROL ANNE BRISBOY,

Plaintiff,

v. Case No. 94-77688-NP

GENERAL MOTORS CORPORATION, a corporation, Hon. Thomas L. Brown

Defendant.

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Arnold D. Portner (P23954)
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Mark R. Granzotto (P31492)
Attorney for Plaintiff
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James P. Feeney (P13335)
Peter M. Kellett (P34345)
Attorneys for Defendant
(810) 258-1580

ORDER DENYING PLAINTIFF'S MOTION TO PRESENT TESTIMONY OF RONALD E. ELWELL

At a session of said Court held in the Ingham County Courthouse, County of Ingham, State of Michigan, on 11/9/95

PRESENT: HON. THOMAS L. BROWN
CIRCUIT COURT JUDGE

Upon reading and filing of Plaintiff's Motion to Present Testimony of Ronald E. Elwell, Defendant's Response, and for all the reasons stated on the record on Wednesday, November 8, 1995:

IT IS HEREBY ORDERED that Plaintiff's Motion To Present Testimony of Ronald E. Elwell be, and hereby is, DENIED.

THOMAS L. BROWN
CIRCUIT COURT JUDGE

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

CAROL ANNE BRISBOY,

Plaintiff,

v. File No. 94-77688-NP

GENERAL MOTORS CORPORATION,
a corporation,

Defendant.

MOTIONS

BEFORE THE HONORABLE THOMAS L. BROWN,
CIRCUIT JUDGE, LANSING, MICHIGAN
-- WEDNESDAY, NOVEMBER 8, 1995

APPEARANCES:

MARK R. GRANZOTTO, J.D.

On behalf of the Plaintiff

JAMES P. FEENEY, J.D.

On behalf of the Defendant

* * *

THE COURT: You are saying that this Court has power to set aside the injunction entered by another Judge?

MR. GRANZOTTO: This Court does, in fact, have that power under Michigan law. This Court, Your Honor, has before it, a case --

THE COURT: I don't have any power to set aside --

MR. GRANZOTTO: We are not.

THE COURT: -- an injunction by another circuit judge, Judge Hathaway in Wayne County Circuit Court?

MR. GRANZOTTO: Now, well, Your Honor, the Defendants have in fact cited to this Court MCR 2.613(B), which they have argued precisely that point which you have no such power. The Defendant's motion is incorrect.

* * *

THE COURT: Is he going to be testifying in any Michigan Courts?

MR. GRANZOTTO: To my knowledge, no.

MR. FEENEY: No, this is the first time the issue has arisen. And an attempt has been made to collaterally attack the courts in Michigan.

MR. GRANZOTTO: Mr. Feeney's comments are incorrect. This is not a collateral attack on an order issued. This Court has the ability to order that Mr. Elwell appear in this Court and give testimony.

Your Honor, what I have presented to this Court is quite simply this: General Motors has bought the silence of a witness who has material evidence in this particular case. They have done so, Your Honor, precisely because they have signed or helped prepare an injunction which has two elements to the -- the first is clearly that Mr. Elwell cannot testify as to privileged matters.

THE COURT: If that's his position, why don't you go down before Judge Hathaway, get it set aside?

MR. GRANZOTTO: Because, Your Honor, you have this case.

THE COURT: But Judge Hathaway has got the injunction.

* * *

MR. GRANZOTTO: I have cited to the Court a Michigan Supreme Court case which indicates that nobody can enter into an arrangement with another party to preclude the presentation of relevant and material evidence. That is a Michigan Supreme Court case which the Defendants, in their brief, choose not to respond to. And there is good why reason [*sic*] they can't respond to it, because they don't have a response to this.

I have also cited to the court the Kuberski opinion from the Michigan Supreme Court which indicates that this Court should be considering the interest of third parties who had no involvement in that earlier order entered by Judge Hathaway.

The third party who was involved in this case is Mrs. Brisboy, the Plaintiff herein. Mrs. Brisboy was not aware, at the time she had her car accident, that she had suffered her

injuries, that General Motors and Mr. Elwell had entered into this settlement under which Mr. Elwell was precluded in giving testimony for future cases involving General Motors.

This Court can consider Mrs. Brisboy's interest in this case. This Court should also consider the fact that this Court is about to conduct a trial in this case in which there is relevant evidence out there which General Motors can preclude from being presented in this Court, precisely, because they have paid money to a witness not to present any evidence testimony in any further cases presented against General Motors. That is what is going on in this case. This Court should not allow that to happen. And under 2.613(B), I am not required to go back before Judge Hathaway to secure such a order.

Does the Court have any further questions?

THE COURT: No, any response?

MR. FEENEY: Yes, Your Honor. Your Honor, we respectfully disagree with Mr. Granzotto in his attempt to convince this Court that he is doing anything other than

seeking to have this Court modify a permanent injunction which was issued by Judge Hathaway in 1992.

* * *

Judge Hathaway has specifically the injunction [*sic*], specifically retaining jurisdiction over Mr. Elwell and his attorney and General Motors with respect to the injunction. . . . I strongly disagree with Mr. Granzotto under the law of Michigan. The way to attack an injunctive order, direct appeal, go back to the judge that issued it.

This notion that he can serve a witness list in this case, and ask you to alter and modify the expressed terms in the injunction, which he admits prohibit Mr. Elwell from testifying, is simply not probable, Your Honor.

* * *

THE COURT: [. . . .] I am going to deny the motion. I think your best bet, go back to see Judge Hathaway to get the restriction lifted.

MR. GRANZOTTO: I am not willing to do it.

THE COURT: Are you going to prepare the order?

MR. FEENEY: Yes, I will. Your Honor.

(Whereupon, proceedings concluded.)

APPENDIX E

STATE OF MICHIGAN
IN THE CIRCUIT COURT
FOR THE COUNTY OF OAKLAND

SHARYN A. MCLAIN, Personal Representative of the Estate of KRISTIN DAWN McLAIN-SUTHERLAND, deceased,
Plaintiff,

vs.

GENERAL MOTORS CORPORATION, FRUEHAUF TRAILER CORPORATION, FREUHAUF TRAILER COMPANY OF CANADA, LTD., FRUEHAUF TRAILER CO., FRUEHAUF CANADA, INC., FRUEHAUF CORPORATION, FRH ACQUISITION CORPORATION, THE TRAILMOBILE GROUP OF COMPANIES, LTD., 160052 CANADA, INC., THE BRADFORD GROUP OF COMPANIES, LTD., GEMALA INDUSTRIES, LTD., TRAILMOBILE OF CANADA, NORAN LEASING, INC., AMERICAN MARINE SHORE CONTROL, INC., RICHARD MINI d/b/a AMERICAN MARINE SHORE CONTROL, INC., MICHAEL PAUL JONES and LEONARD MARTIN, jointly and severally,
Defendants.

Case No. 93-465507-NP
HON. RUDY J. NICOLS

ORDER DENYING PLAINTIFF'S MOTION TO ALLOW DEPOSITION OF RONALD ELWELL

At a session of said Court, held in the City of Pontiac, County of Oakland, State of Michigan on 3/11/96.

Plaintiff's Motion To Allow Deposition of Ronald Elwell was argued before this Court Wednesday March 6, 1996.

Plaintiff Sharyn McLain is the personal representative for the deceased Kristin McLain-Sutherland who died following an accident in her S-10 Blazer on March 20, 1992. Basically, Sutherland's S-10 Blazer struck a trailer blocking the westbound lanes of M-59 and then was hit by another truck moments later.

In Plaintiff's product liability component of the case, Plaintiff maintains that a rubber sleeve holding fuel hoses spilled and ignited a fire that caused Ms. McLain-Sutherland's death. Defendant G.M. maintains the Blazer's hoses were not the cause of Ms. McLain-Sutherland's death but rather that the second collision led to a combustion and her death.

Plaintiff argues it has a witness -- a Mr. Ronald Elwell -- who was a former GM employee/engineer who could testify as to the soundness of the rubber sleeve holding the fuel hoses at issue and that he (Elwell) advocated a better alternative which GM failed to adopt for economic reasons. Defendant GM claims otherwise and that Elwell is prohibited from testifying due to an August 1992 injunction precipitated by a consent settlement reached between GM and Elwell in a wrongful discharge action which prohibits Elwell from testifying in suits against GM without GM's consent.

MRE 102 and 6112(a) provide that a Trial Court's quest must -- and should be -- the ascertainment of the truth. A Trial Court, as such, is a vehicle for getting the information -- proper information -- before the fact-finder. In this case, however, there is an Injunctive Order this Court is being asked to observe (or ignore) that appears to preclude information from getting before the fact-finder which could have an impact upon the trial's outcome.

Despite the potential gravity of Elwell's testimony, however, this Court declines to "permit the deposition of Ronald Elwell to go forward," as requested by Plaintiff, for the following reasons:

1) It appears that Plaintiff has failed to Notice for Deposition the testimony of Mr. Elwell. Even if Plaintiff has so noticed the deposition, Plaintiff is seeking an advisory ruling on an issue not properly before this Court. As noted in Reed v. Soltys, 106 Mich App 341 (1981), the 1992 Wayne County order must be obeyed until overturned on direct appeal, @ p. 350.

2) Plaintiff argued on March 6 that Plaintiff is not seeking privileged information and that others besides Elwell know the same information. As such, there appears to be less drastic alternatives than that of violating Judge Hathaways order, i.e., Plaintiff can resort to other engineers who could testify on her behalf.

3) Plaintiff has not addressed why this Court should grant her request when it is beyond the discovery cut-off date that applies to this case.

4) While Plaintiff argued otherwise, Plaintiff clearly asks this Court to ignore the plain meaning of the August 1992 Permanent Injunction. Plaintiff does this despite the clear intent of that injunction and having been twice denied relief by the Judge who issued the order.

For these and other reasons stated by Defendant, Plaintiffs Motion is DENIED.

RUDY J. NICHOLS
CIRCUIT JUDGE

3/11/96
Date

Rudy J. Nichols - Circuit Court Judge

(14)

No. 96-653

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Counsel for Petitioners

August 18, 1997

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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REPLY BRIEF FOR PETITIONERS

In our opening brief, we showed that the Eighth Circuit erred in holding that 28 U.S.C. § 1738 prevents petitioners, who were not parties to a Michigan state-court suit that resulted in a consent decree between Ronald Elwell and General Motors, from calling Mr. Elwell as a witness in a federal court proceeding in Missouri. For a consent judgment approved by a single state judge to prevent everyone in the nation from obtaining such evidence in any other forum would constitute a blatant violation of the rights of nonparties and would have the startling effect of depriving state and federal civil, criminal, and administrative tribunals of relevant, nonprivileged evidence important to the administration of justice.

I. PETITIONERS, AS NONPARTIES, MAY NOT BE BOUND BY THE MICHIGAN JUDGMENT

1. As this Court recently explained, "a settlement agreement subject to court approval in a nonclass action may not impose duties or obligations on an unconsenting party or 'dispose' of his claims." *Lawyer v. Department of Justice*, 117 S. Ct. 2186, 2194 (1997) (citation omitted). GM and its amici[1] attempt to escape the force of this argument by contending that all the Eighth Circuit has done is to enforce the state-court judgment against Elwell. The Bakers, they say, are simply the unfortunate victims of the "incidental" fallout (PLAC Br. 14) of that enforcement — as if Elwell had been rendered physically unable to appear as a witness. *Cf.* GM Br. 39.

a. The fatal flaw in this argument — apart from the conspicuous *absence* of enforcement proceedings *against Elwell*, *see* n. 2, *infra* — is demonstrated by the very examples used to support it. Of course, a judgment can have *practical effects* on third parties — through, for example, the exhaustion of a company's assets by a prior judgment. *See* GM Br. 39. Similarly, if A wins a judgment that results in a transfer of property from B to A, C might be prevented as a practical matter from recovering the property from B because B no longer has title. *See* PLAC Br. 15. And of course, death or other incapacity might prevent a witness from testifying.

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[1] References to Respondent's Brief are styled "GM Br. __." References to the amicus brief of the Product Liability Advisory Council, Inc. are styled "PLAC Br. __." References to the amicus brief of the National Association of Manufacturers, et al., are styled "NAM Br. __."

But this case is not analogous to any of those examples. Rather, the proper analogy here would be a prior judgment in which A obtains a decree enjoining B from selling certain property. If B still has title, nothing in the full faith and credit obligation bars C, who was not a party or privy in the first proceeding, from successfully suing B, who still has the property, for a decree compelling B to transfer it to C.[2] In PLAC's example, the transfer of title from B to A pursuant to the judgment is an operative fact that leaves B with no property to transfer. In our example, B still has the property, just as here Elwell is available to testify.[3] In fact, GM criticizes Elwell for being present in Missouri and being willing and able to testify at trial. GM Br. 7-8 & n.4.

The Eighth Circuit held that, under § 1738, the Bakers are precluded by the state decision from obtaining the relief they seek, not because Elwell is physically incapable of providing it, but because the decree directly adjudicated the legal question of whether Elwell would be permitted to testify. To say in these circumstances that the judgment is simply being enforced against Elwell is to play a word game that not even the court below purported to play.

b. This Court's cases make the distinction plain. In *Martin v. Wilks*, 490 U.S. 755 (1989), for example, this Court applied "the general rule that a person cannot be deprived of his legal rights in a proceeding to which he is not a party." *Id.* at 759. At issue there were employment promotion decisions taken pursuant to consent decrees. The district court had held that the legality of these decrees had been determined in a prior action and that the issue of the

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[2] Of course, the question of whether B can or should be held in contempt of the initial order as a result of the transfer to C is a different one, but that problem cannot arise here because of the agreement between Elwell and GM exempting Elwell from such a sanction if he is required to testify, as he was here by being subpoenaed. Pet. App. 5a.

[3] PLAC argues: "suppose that A obtains a judgment requiring B to close his adult bookstore on nuisance grounds. C's right to purchase from B is obviously affected, but no one would say that C has therefore been bound by the judgment." PLAC Br. 15. Yet while the closure of the bookstore in this example is an operative fact that has a practical effect on C, no legal right or interest of C has been adjudicated. The proper analogy would be a private civil action by A against B for a declaratory judgment that anyone who purchases from B's adult bookstore is abetting a public nuisance — a judgment that could not be binding on C.

lawfulness of the decrees could not be revisited by the new plaintiffs. In reversing that judgment, this Court rejected the very argument advanced by GM and its amici here:

> The dissent argues . . . that respondents have not been "bound" by the decree but, rather, that they are only suffering practical adverse effects from the consent decree. . . . If [the decree] is a defense to challenges to employment practices which would otherwise violate Title VII, it is very difficult to see why respondents are not being "bound" by the decree.

Id. at 765 n.6.[4]

Similarly, in *Hansberry v. Lee*, 311 U.S. 32 (1940), this Court held that defendants in a case brought by property owners who sought to enforce a restrictive covenant — which provided that it was not effective unless signed by the owners of 95 percent of frontage in the area — could not be bound by a stipulation in a prior suit that the owners of 95 percent had signed. *Id.* at 38. Under the reasoning of GM and its amici, this Court should have treated the prior stipulation in *Lee* as binding in the subsequent litigation because "judgments affect third parties in this way all the time." PLAC Br. 15. But this Court has repeatedly rejected such an approach.[5]

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[4] Even the dissent in *Martin* is consistent with our view. The dissent contended no more than that judgments might have incidental effects on third parties "as a practical matter" and recognized that judgments could not "deprive[]" third parties "of their legal rights." 490 U.S. at 769, 770 (Stevens, J., dissenting).

[5] *See also Hanson v. Denckla*, 357 U.S. 235, 255 (1958) (judgment as to appearing defendants could not bind absent trustee and was not entitled to full faith and credit); *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957) (state court judgment could not "extinguish any right" of absent party); *Williams v. North Carolina*, 325 U.S. 226, 230-31 (1945) (state court's finding of domicil not binding on absent party); *Blodgett v. Silberman*, 277 U.S. 1, 19 (1928) (New York surrogate court's judgment could not decide power of Connecticut (as nonparty) to impose transfer tax); *Fall v. Eastin*, 215 U.S. 1, 11-12 (1909) (upholding Nebraska court's refusal to enforce, against third-party purchaser from husband, a Washington decree in suit between husband and wife regarding title to Nebraska land); *Winona & St. P. Ry. Co. v. Plainview*, 143 U.S. 371, 390 (1892) (judgment between town and bona fide purchasers of municipal bonds was not binding, as a matter of full faith and credit, in dispute between town and railroad over same bonds).

c. The cases cited by GM and its amici are remarkably inapposite. The leading case, we are told, is *Morris v. Jones*, 329 U.S. 545 (1947). GM Br. 22, 24, 39; PLAC Br. 17; NAM Br. 14. There, this Court held that an Illinois liquidator was in "privity" with Chicago Lloyds (329 U.S. at 550), an insurance association which had defaulted in a prior Missouri action brought against it by one Morris. The liquidator was therefore bound as a party to that action. The dissent disagreed, arguing that the liquidator was a "stranger" (*id.* at 563) to the prior action, but conceded that the liquidator was "trustee" for the creditors (*id.* at 562). Thus, in the view of the majority, concepts of privity and representation bound the liquidator, and the creditors he represented, under the Full Faith and Credit Clause. This reasoning lends no support to GM's argument here, for the Bakers were not parties or privies to the Michigan proceeding.

Indeed, cases such as *Morris v. Jones*, and *Riehle v. Margolies*, 279 U.S. 218, 228 (1929) (cited at PLAC Br. 17), *undermine* GM's position. For their lesson is that private plaintiffs (such as Morris) have (at least until the commencement of bankruptcy or similar proceedings) the right to pursue common-law damages actions in the courts of their choosing, without interference from courts in foreign jurisdictions. The Bakers assert the same right here.

2. GM contends that the Bakers have no judicially cognizable liberty or property interest in obtaining Elwell's testimony that would trigger due process protections, GM Br. 35-41, and that, in any event, they did not preserve the issue below. GM Br. 34. Of course, our position on the question presented does not stand or fall on the due process issue because, as we made clear in our opening brief (at 11), the Eighth Circuit's holding is inconsistent *both* with principles of due process *and* with the statutory full faith and credit obligation embodied in § 1738.[6] Thus, even apart from issues of due process,

[6] Our argument is in no sense limited to a Missouri federal court, as GM and its amici seem to assume. It would be equally applicable if the question were to arise, for example, in the course of a deposition (authorized by the Federal Rules of Civil Procedure) in New Mexico federal court, or even in a *Michigan* federal court. The only forum in which the due process question would itself be controlling would be a Michigan *state* court, where no issue of full faith and credit would arise. Whatever ability Michigan state courts may have, as a matter of their own rules of venue, to remit Michigan plaintiffs to the Wayne County court to adjudicate in the

§ 1738 should not, as matter of statutory construction, be interpreted as running afoul of the "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process," *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), or of the "'deep-rooted historic tradition that everyone should have his own day in court'" so that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin*, 490 U.S. at 762 (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)). Indeed, GM and its amici note that this Court used the same approach in *Martin v. Wilks* in resting its decision on a construction of the Federal Rules of Civil Procedure rather than on the Fifth Amendment Due Process Clause itself. GM Br. 36 n.23; PLAC Br. 21. Nonetheless, we strongly contend that the judgment below *did* violate the Bakers' due process rights.

a. The argument that nonparties to a proceeding may not be bound by a judgment in that proceeding was made first in the district court decision under review. *See* Pet. App. 28a. In petitioners' brief before the Eighth Circuit panel, they responded to GM's full faith and credit argument by noting, *inter alia*, that they "were not parties to the proceedings resulting in the Injunction, and it is difficult to see how the Injunction could affect their rights." JA 50. Petitioners also submitted to the panel — *before* it rendered its decision — opinions of other courts rejecting application of the Michigan judgment to nonparties on the ground that "[b]edrock constitutional principles mandating procedural fairness preclude such a result." *Smith v. Superior Court*, 49 Cal. Rptr.2d 20, 27 (Ct. App. 1996), *review denied*, 1996 Cal. LEXIS 2185 (Cal. Apr. 18, 1996). *See* JA 5-6 (submissions under FRAP 28(j)); Letters of Jan. 16, 1996; April 23, 1996; and May 10, 1996. It is simply incorrect to imply that the nonparty issue was raised only in the petition for rehearing. GM Br. 34. This Court itself called for the record below before deciding to

first instance the applicability of the judgment to them (GM Br. App. D, E) derives from the personal jurisdiction of those courts over Michigan litigants and in no way supports the judgment of the Eighth Circuit.

grant certiorari on the question presented.[7]

b. As NAM acknowledges (NAM Br. 24), the "use of established adjudicatory procedures" (*Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982)) for vindicating a claim, securing relief, or redressing a grievance may give rise to a constitutionally protected interest. The Bakers subpoenaed Mr. Elwell's testimony pursuant to Fed. R. Civ. P. 45, and that subpoena was properly served on Mr. Elwell while he was within the jurisdiction of the federal district court in Missouri. Pursuant to the Federal Rules of Evidence and Federal Rules of Civil Procedure, the Bakers then sought to introduce his testimony in court.[8]

The right to invoke established adjudicatory procedures for obtaining evidence itself constitutes an entitlement or claim — whether it stands apart from other litigation or is embedded in an underlying lawsuit against a tortfeasor for money damages. If Elwell had refused to testify after being validly served with a subpoena, the Bakers could have sought contempt sanctions under Fed. R. Civ. P. 45(e) and 28 U.S.C. § 1826. *See Logan*, 455 U.S. at 430-31 ("The hallmark of property" is "an individual entitlement" "which cannot be removed except 'for cause,'" so that "[a] claimant has more than an abstract desire or interest in redressing his grievance").

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[7] Further, since the full faith and credit issue was indisputably argued before, and decided by, the Eighth Circuit, the due process dimension of that issue is cognizable under the "enlargement" doctrine. *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899). In any event, in reviewing the judgment of a lower federal court, there is no jurisdictional barrier to the consideration of issues not fully litigated below. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980).

[8] NAM contends that the Bakers have no cognizable property interest under Missouri law. NAM Br. 22. But it is *federal*, not *state*, law that creates the entitlement at issue here. In any event, the Missouri Attorney General — a more authoritative source than NAM on issues of Missouri law — takes the view that the Bakers have a right of access to relevant, nonprivileged evidence and that application of the Michigan judgment would violate due process. Mo. AG Br. 8-10. NAM's cases are inapposite; none remotely calls into question the right of litigants to invoke established adjudicatory procedures for obtaining evidence. *E.g., Martin v. Schmalz*, 713 S.W.2d 22, 23 (Mo. App. 1986) (statute limiting access to arrest records applies retroactively); *Brown v. Hamid*, 856 S.W. 2d 51, 56-57 (Mo. 1993) (finding no need to recognize tort of intentional spoliation of evidence where there was no proof of intentional wrongdoing, although noting Missouri's leading "role in developing the spoliation doctrine in evidence law").

We certainly do not contend (as claimed in NAM Br. 24-25) that civil plaintiffs have a constitutional right to particular pieces of evidence or to particular evidentiary rules. Rather, we submit that "established adjudicatory procedures" for vindicating a claim to obtain relevant and nonprivileged evidence create cognizable property rights as a matter of federal law. *Logan*, 455 U.S. at 429. The suggestion by GM and its amici that this proposition would portend a radical change in federal judicial procedure has the matter precisely backwards. Since at least 1915, this Court has recognized the federal right of litigants in federal court to invoke judicial procedures for securing access to "evidence material to [their] case." *Ex parte Uppercu*, 239 U.S. 435, 439 (1915); *see also id.* at 439-40 ("The general principle is that [a party seeking discovery] has a right to have [the materials he is seeking] produced. . . . The necessities of litigation and the requirements of justice found a new right of a wholly different kind."). To accept GM's view that the Bakers had *no* legally cognizable entitlement to press their claim to obtain Elwell's testimony would mean that the district court would have been free, consistent with due process, simply to forbid them from seeking a subpoena or that the court could have decided whether to admit Elwell's testimony by flipping a coin. "Certainly," in the words of the *Logan* Court, 455 U.S. at 431, "it would require a remarkable reading of a 'broad and majestic term[],' to conclude that a horse trainer's license is a protected property interest under the Fourteenth Amendment," while the right of a child to use legally established adjudicatory procedures to adduce probative evidence in a tort suit for the death of his mother is not. Even the Eighth Circuit assumed that the judgment implicated "the discovery rights of litigants," although it mistakenly believed that those rights could be overridden. Pet. App. 15a. The district court, in permitting Elwell to testify, similarly recognized that the judgment purported to "define[] the rights of innocent third parties who have a keen interest in the information which Elwell holds." Pet. App. 28a.[9]

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[9] Even cases cited by GM and its amici recognize enforceable rights of access to evidence, in contexts less compelling than the instant case. *E.g., Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775,

Our argument does not mean, of course, that generally applicable adjudicatory procedures used to determine the admission of evidence cannot be changed, or that the use of evidence cannot be restricted for a wide variety of reasons. *See Logan*, 455 U.S. at 432-33. What it does mean is that actions depriving an individual of the entitlement are subject to procedural due process limitations — that the entitlement cannot be taken away arbitrarily (as in *Logan)* or (as here) because of an adjudication in another forum in which the person to be deprived did not participate.[10]

c. In any event, GM does not dispute that the right to adduce testimony pursuant to a court's compulsory process — whether or not *itself* deemed a "claim" under *Logan* — is at least *ancillary to* a protected property interest: a cause of action for damages. Instead, GM and its amici defend the judgment below on the ground that Elwell is just another expert witness whose testimony is of minimal value to the Bakers, at best.

The record reveals, however, that Elwell was designated as a fact witness (Pet. App. 22a) and testified as such at trial. In particular, he testified regarding a 1973 document known as the "Ivey" memorandum, Tr. 407-15; Plaintiffs' Exhibit 621; Pet. App. 6a, which is a value analysis prepared by Edward Ivey, an Advance Design employee, and allegedly circulated among selected top GM

789 (1st Cir. 1988). The existence of such rights cannot be denied by noting that private parties are sometimes unable to obtain evidence for practical reasons of geography, scheduling, or financial constraints. GM Br. 37. We deal here with the application of § 1738 by the judicial branch of government to deny the Bakers access to established adjudicatory procedures for obtaining evidence.

[10] It is true that the *result* in *Martin v. Wilks* was substantially modified by Congress. PLAC Br. 21 n.16. But whatever the extent of Congress' power to affect rights through generally applicable legislation, *see Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915), such power does not justify the denial of a litigant's procedural due process rights through a judicial proceeding in which he or she is not a party. *Logan*, 455 U.S. at 432-33; *cf. Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2238, 2252 (1997). Further, in responding to *Martin*, Congress provided that a nonparty could be bound *only* in a very limited context — in which there had been adequate prior notice and opportunity to present objections to the court. 42 U.S.C. § 2000e-2(n)(1)(B). Neither was the case here. And Congress recognized that even this step was subject to constitutional limitations. 42 U.S.C. § 2000e-2(n)(2)(D).

and Oldsmobile officials who were at that time responsible for the overall fuel system design of GM vehicles. Pet. App. 6a. The Ivey memorandum analyzed the potential expense of the loss of human life per vehicle due to fuel-fed engine fires. The document stated that "[e]ach fatality has a value of $200,000." Tr. 415. It concluded that the cost to society of deaths and injuries from such fires was only about $2.40 per vehicle. Tr. 415-16; Pet. App. 6a. According to Elwell, the memorandum addressed

> what we were able to spend in our opinion to eliminate those fires . . . . [T]he Value Analysis says all we have got is $2.[40] to play with, if you will. We can either put that money in a fuel tank, put that money in a fuel pump, put that money in a fuel line, but in our opinion in order to save these people from dying we can put only $2.[40] into the new cars.

Tr. 418-19. Elwell's testimony was central in showing that top GM and Oldsmobile officials had received the Ivey memorandum and thus in supporting the Bakers' argument that GM had instituted a callous decisionmaking process that substantially undervalued the importance of instituting fire safety improvements.

In any event, the distinction between fact and expert witnesses cannot be of constitutional dimension, nor can it change the due process and full faith and credit analysis in this case. For example, if a defendant obtained from court A an injunction prohibiting a certain witness from testifying as an expert against it on the ground that the person was not qualified, surely that order could not be applied to prevent subsequent plaintiffs (unrepresented in the first action) from relitigating the issue of that person's qualifications as an expert.

Nor can any line be drawn according to the subjective impression of how important a particular witness' testimony might be to a party's case. Such an approach ignores the typical reality of litigation that *every* piece of evidence potentially plays some irreplaceable role in building a plaintiff's or a defendant's case.[11] It is also utterly

[11] *E.g., United States v. Mendoza-Salgado*, 964 F.2d 993, 1007 (10th Cir. 1992) ("'all the evidence was mosaic, each making its contribution, and all building up to a compelling whole that . . . the jury should actually view'") (quoting *United States v. Masiello*, 235 F.2d 279, 283 (2d Cir.), *cert. denied*, 352 U.S. 882 (1956)); *United States v. Marks*, 816 F.2d 1207, 1212 (7th Cir. 1987) ("the probative value

unadministrable and would turn GM's fear of "micromanag[ing]" litigation (GM Br. 38) into reality by requiring courts to decide just how seriously the exclusion of otherwise admissible evidence would damage a plaintiff's case. Thus, PLAC's acknowledgment that the proper disposition of this case would change if Elwell's testimony were "profound" or "central to petitioners' claim" (PLAC Br. 18 n.14, 22) is telling: not only does Elwell's testimony fall precisely into those categories — as petitioners' willingness to pursue its exclusion all the way to this Court attests — but there is no tenable constitutional theory to support the ad hoc and unprincipled distinctions that GM and its amici attempt to draw.

Nor is there any merit to GM's suggestion that a judgment to which a litigant was not a party may be applied to bar the litigant from presenting certain evidence, defenses, or issues, so long as the judgment is not invoked to eliminate the cause of action altogether. GM Br. 35. Indeed, even in *Martin v. Wilks*, the district court's initial determination that the legality of the consent decrees had been determined in a prior action did not extinguish the plaintiffs' causes of actions *altogether* — there remained for trial, for example, the issue of whether the challenged promotions were indeed required by the decrees. 490 U.S. at 760. But this Court held that the prior adjudication regarding the lawfulness of the decrees could not prevent the new plaintiffs from re-examining *that* issue. So too, *Hansberry v. Lee* involved the binding effect of a single stipulation in a prior proceeding — not the abolition of an entire cause of action. Similarly, in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969), this Court held that a single stipulation entered into by one party could not be applied against another. And in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), this Court held that due process protected the right of each litigant to present evidence and arguments regarding the issue of a patent's *validity*, and that it was not enough merely to permit litigation over *other* aspects of a patent infringement claim. *Id.* at 329 ("Some litigants — those who never appeared in a prior action — may not be collaterally estopped without litigating the issue. . . . Due process prohibits estopping them despite one or more existing

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of evidence often depends on its being part of a mosaic").

adjudications of the identical issue which stand squarely against their position."). *See also* n.5, *supra*.

3. GM and its amici propose other procedural means by which litigants like the Bakers supposedly can avoid the harsh effects of the Michigan judgment. The tenor of these proposals is illustrated by the absurd suggestion that individuals like the petitioners — anticipating that they or their loved ones might some day be injured or killed in a GM vehicle — should have intervened in the Michigan proceeding involving Elwell. PLAC Br. 16 (otherwise, they "must live with the consequences") (*sic*). Such a view makes the settlement that was rejected in *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231 (1997), seem modest by comparison. The general rule, of course, is that — even when no time-travel would be required — "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Richards v. Jefferson County*, 116 S. Ct. 1761, 1766 n.5 (1996) (citing *Chase Nat. Bank v. Norwalk*, 291 U.S. 431, 441 (1934)); *see also Martin v. Wilks*, 490 U.S. at 763-64.

The related argument that the due process problem can be resolved on the ground that the Bakers are *now* free to seek a modification of the decree from the rendering court in Michigan is both incorrect and deeply cynical. Either the Michigan judgment is entitled to full faith and credit in the federal court proceeding in Missouri, or it is not. If it is not, then it may be ignored. *Martin*, 490 U.S. at 763 ("'Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.'") (quoting *Chase National Bank*, 291 U.S. at 441); *Firefighters v. Cleveland*, 478 U.S. 501, 529 (1986) ("[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement."). The suggestion that the Bakers, as Missouri residents, are nonetheless obliged to seek modification of the order in a Michigan state court is just another way of arguing that they *are* governed by the Michigan judgment under § 1738. It begs the question before this Court.

It is no answer to say that the Michigan court *might* modify its judgment if requested to do so by the Bakers; a nonparty may always beseech a court to reconsider a prior decision, yet that cannot justify binding the nonparty to that decision. There is nothing in federal law

that requires a state court even to *listen* to a stranger in these circumstances, and if it is willing to do so as a matter of "discretion" (NAM Br. 27), that may be solely to have the satisfaction of turning down the request. That is exactly what the Michigan court has already done on several occasions, as GM is at pains to show. GM Br. 7.[12]

The issue here is not third-party access to sealed records of the Michigan proceeding (if indeed any exist). GM Br. 40-41; NAM Br. 18-20. The information that the Bakers seek from Elwell is not knowledge that Elwell gained as a result of the Michigan proceeding, nor is it evidence uniquely within control of the Michigan court. In fact, the court never addressed the Ivey memorandum or any of the other topics on which Elwell testified in the *Baker* trial. Thus, although "courts routinely seal evidence" (PLAC Br. 20) and although a litigant or member of the media seeking those very materials must usually, for practical reasons, apply for relief to the court with custody of the records, that procedure never stops a litigant from obtaining the same evidence independently and introducing it in a separate lawsuit. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984); *see also Butterworth v. Smith*, 494 U.S. 624, 636-37 (1990) (Scalia, J., concurring). A court sealing evidence does not purport to issue a decree binding nonparties in separate litigation to a decision that a particular evidentiary submission is inadmissible nationwide.

4. GM pretends that the injunction is justified because it is impossible for Elwell to testify without revealing privileged or confidential information. No court — in Michigan or elsewhere — has ever made such a finding — and, if such a finding had been made, it would not be binding on the Bakers. In fact, when GM sought a litigated judgment restraining Elwell from testifying, the court *denied* it. *See* p. 15, *infra*. GM points to a stipulation in which Elwell agreed

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[12] *Mathews v. Eldridge*, 424 U.S. 319 (1976) (NAM Br. 26-27), is wholly inapposite here. This case does not involve comparing two different ways of adjudicating on its merits the Bakers' right to adduce evidence. Rather, it involves replacing an adjudication on the merits by a federal court in Missouri with, at best, a chance to seek a discretionary dispensation from a Michigan court that has already entered a judgment adverse to the Bakers' contention in a proceeding in which they played no part whatever.

that, "*depending on the subject matter*," it is "extremely difficult" for him — a non-lawyer — to determine whether certain information is legally privileged. JA 30 (emphasis added).[13] GM's lawyers suffer from no such disability. In fact, Elwell *has already* testified in the first trial in this case, and *GM did not raise a single objection relating to attorney work product or attorney-client or trade secrets privileges*. Nothing about the Ivey memorandum, for example, is remotely privileged. In many other trials as well, Elwell has testified at length while typically drawing few objections from GM (and even fewer sustained objections) on grounds of privilege. Pet. App. 33a. In *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ga.), Elwell testified for two days (370 transcript pages) before GM made its first objection on grounds of privilege. All told, it made three such objections in 580 transcript pages. GM's current claim of privilege (GM Br. 4, citing JA 23-28) centers on documents that Elwell supposedly took when he left GM — a claim which has nothing do to with whether Elwell can provide nonprivileged *oral testimony* in this case.

More fundamentally, the privilege issue is irrelevant to the question presented. The Bakers are, and always have been, willing to litigate any issues of privilege or confidentiality that GM may wish to raise. The question here is whether the application of § 1738 can *preclude* them from doing so. The answer should be no.

5. GM argues that the Bakers can be bound by the consent judgment as persons "acting in concert" with Elwell. GM Br. 48. There is no evidence in the record to support this charge, and GM surely would have adduced it below if it had been available. In fact, the injunction was narrowed to exclude persons acting in concert. While the initial litigated injunction referred to agents, attorneys, and those "in active concert or in participation" with Elwell, JA 9, the parties agreed to delete the reference to such persons in the consent judgment. JA 30-31.

In any event, there is no contempt for the Bakers to "abet." GM

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[13] The fact that the original source of information might have been an attorney or an attorney's work product does not mean that the information itself is privileged. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) ("The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.").

agreed that, if Elwell testified pursuant to a court order (as here), then he could *not* be held in violation of either the judgment or the settlement agreement between Elwell and GM. Pet. App. 15a n.11. Tellingly, despite its gratuitous attacks on Elwell in its brief, GM has never moved the Michigan court to hold Elwell in contempt — much less to punish the Bakers or any of the other plaintiffs in whose cases Elwell has testified.

Moreover, the issue of contempt has no bearing on the question presented. Even if the Michigan state court could have held the Bakers in contempt, the federal district court in Missouri or the Eighth Circuit would have had no business doing so. "It is well settled that no court can punish a contempt of another court, and that the court whose order or authority is defied alone has power to punish it, or entertain proceedings to that end." *Typothetae of New York v. Typographical Union No. 6*, 138 App. Div. 293, 294 (N.Y. 1st Dept. 1910); *see also Ex parte Bradley*, 74 U.S. (7 Wall.) 364, 372 (1868); 17 Am. Jur.2d *Contempt* § 41 (1996). GM's plea for a remand to develop the "facts" in this regard is thus wholly unwarranted.[14]

II. EVEN IF FULL FAITH AND CREDIT WERE TRIGGERED, IT WOULD YIELD HERE TO OTHER, OVERRIDING PRINCIPLES

Even if there were occasions on which nonparties could be bound under § 1738, this case is not one of them. Our argument here focuses not on the sweeping assertions attributed to us by GM and its amici — assertions we have never made — such as the proposition that injunctive decrees are never entitled to full faith and credit. What we *do* argue, and what GM largely ignores, is that the application of the Michigan judgment to control the Missouri federal proceeding would turn the full faith and credit obligation into a sword, not a

[14] GM's plea is also untimely. The argument was not raised below, even though the question of whether nonparties could be bound by the Michigan judgment was squarely before both the district court and the court of appeals. The petition in this case stated, and this Court's review must proceed on the assumption, that petitioners "were not parties to the state proceeding or in privity with any party." Pet. for Cert. i. Any claim that the Bakers were "in active concert or participation" with Elwell (GM Br. 48) should have been raised in the Brief in Opposition. *See* S. Ct. Rule 15.2.

shield, by affirmatively interfering with the Bakers' access to federal court and with the institutional and systemic interests in the integrity of the federal proceeding. The full faith and credit obligation has never been thought to empower one court to control litigation in another by compelling the second court (i) *not* to permit witness X to testify, or (ii) *to* permit witness Y to testify, or (iii) to require witness Z to testify in a particular manner.

GM insists that state courts can be trusted not to enter injunctions that would entail such disastrous effects. GM Br. 30. Yet that cannot justify according full faith and credit to such orders if and when they *are* issued. And the consent decree rubber-stamped by the state judge in this very case disproves GM's assurance that abuses will not occur. The two-day "full adversarial hearing" to which GM refers (GM Br. 4) resulted in the explicit *denial* of GM's request to enjoin Elwell from testifying against GM. JA 10. The first Michigan judge made no finding that Elwell had violated any privilege of, or obligation to, GM. *Id.* Instead, she *refused* to prevent Elwell from testifying in the *Moseley* trial. *Id.* The injunction at issue (JA 29-31; Pet. App. 19a-21a) was entered as a consent decree *nine months later* by a *different* judge who held no adversarial hearing, made no findings, and simply rubber-stamped an agreed order supplied by GM. The district court in this case concluded that "GM bought Elwell's silence." Pet. App. 26a. There is no need to sketch a parade of horribles here; this case is itself the evil to be averted.

1. Once our argument is understood, much of the response to it vanishes. The values that § 1738 is supposed to serve — such as the "prestige and dignity behind a judgment" and the "institutional reputation" of the court (PLAC Br. 5, 6) — would be severely undermined if, in hearing the *Baker v. GM* case, the federal court were forced to render a decision without the benefit of probative, nonprivileged information, in violation of the historic right to "everyman's evidence." The court would risk becoming an instrument of injustice. That risk is the impetus for our reliance on Restatement (Second) of Conflict of Laws § 103 (1971) (recognizing limited exception for judgments "involv[ing] an improper interference with important interests of the sister State"), and on the warning that the Full Faith and Credit Clause was meant to prevent "parochial entrenchment on the interests of other States." *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion). Even

PLAC acknowledges that full faith and credit may not require enforcement of a decree that constitutes an "'onerous'" imposition on the forum in which its enforcement is sought. PLAC Br. 11 n.7 (quoting Restatement (Second) § 102, comment c).

2. The question here is not simply "recognition" of the Michigan injunction — for example, in the claim preclusion sense of not allowing GM to sue again for greater relief, or in the collateral estoppel sense of issue preclusion as between the parties or in favor of a nonparty. Rather, the question involves the *enforcement* of the decree — the granting of "affirmative relief" (Restatement (Second), at 302) — by the federal court.[15] That question is an open one in this Court.[16] Although GM and its amici take the broad view that all injunctive decrees are entitled to full faith and credit, the authorities on which they rely do not go so far. The leading commentator's view is that "[t]he analysis of the case law must distinguish . . . among the various types of decrees." Albert A. Ehrenzweig, CONFLICT OF LAWS § 51, at 182 (rev. ed. 1962).[17]

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[15] The enforcement of a decree against a nonparty to exclude admissible and nonprivileged evidence is hardly an action that is "easily and regularly taken" (PLAC Br. 11) by federal courts.

[16] Because this case involves the enforcement, and not merely the recognition, of the Michigan injunction, *Lynde v. Lynde*, 181 U.S. 183, 187 (1901), is squarely applicable. *See also Bray v. General Motors Corp.*, No. 93-C-265, slip op. 5 (D. Colo. Jan. 20, 1995) ("Permanent injunctions entered in a sister state offer more potential for interference with the forum state's interests as a sovereign entity than do monetary judgments. Indeed, the permanent injunction at issue in this case affects the sovereign interests of Colorado in much the same way as would the application of a sister state's law."); *Meenach v. General Motors Corp.*, 891 S.W.2d 398, 402 (Ky. 1996) ("neither the Full Faith and Credit Clause nor rules of comity require compulsory recognition of an injunction issued in another jurisdiction"). Lower-court authorities cited by GM and its amici concerning interpretation of state law (rather than § 1738) are inapposite. PLAC Br. 7 (citing *Marie Callender Pie Shops, Inc. v. Bumbleberry Enters., Inc.*, 592 P.2d 1050, 1052 (Or. App. 1979); *LaVerne v. Jackman*, 228 N.E.2d 249, 253 (Ill. App. 1967)).

[17] Professor Ehrenzweig explains that several "types of equity decrees have continued to present problems," including "[d]ecrees ordering an extrastate act or forbearance." CONFLICT OF LAWS § 51, at 182-90; *see also* Eugene F. Scoles & Peter Hay, CONFLICT OF LAWS § 24.9, at 964, 965 & n.5 (2d ed. 1992) (enforceability of equity decrees besides those for divorce or payment of money damages "generally has been a matter of some uncertainty" because "the act or forbearance ordered by the decree may itself violate local prohibitions or public policy in a way that a decree for money does not" and decree may "operate impermissibly in the second forum itself").

The reasons for not enforcing this decree involve the federal interest in the institutional integrity of federal judicial proceedings and the right of access to a federal court and to the established adjudicatory procedures of that court. The zeal with which these related federal interests have been protected is evident in a wide range of cases: *Donovan v. Dallas*, 377 U.S. 408, 412-13 (1964) (cited in our Opening Br. 27-28); *General Atomic Co. v. Felter*, 434 U.S. 12, 16-17 (1977) (*per curiam*), which made clear that even prospective federal court litigation cannot be enjoined by state courts, for reasons deducible from the statutory grant of federal judicial jurisdiction; *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958), which protected the federal interest in having disputed factual issues decided by a jury, even where it was not required by the Seventh Amendment; *Hale v. Bimco Trading, Inc.*, 306 U.S. 375, 377-78 (1939), which held that a successful mandamus proceeding in a state court against state officials to enforce a challenged statute may not be applied to bar relief in a United States district court against enforcement of the statute by state officials at the suit of strangers to the state court proceedings; and *Railway Co. v. Whitton's Administrator*, 80 U.S. (13 Wall.) 270, 286 (1871), which held that a state statute limiting wrongful death actions to state courts could not bar a suit in federal court.[18] The principle of non-interference is also manifested in the pattern of decisions in the lower courts declining to give full faith and credit to antisuit injunctions. PLAC Br. 27.

The establishment of federal courts under Article III, the legislative grant of jurisdiction pursuant to that Article, and the promulgation of a code of rules for litigation of claims in the federal courts, furnish a strong basis, rooted in federal constitutional and statutory law, for not binding a stranger to a state injunctive decree in a manner that significantly impairs federal litigation rights.

GM attempts to distinguish *Donovan v. Dallas* and related

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[18] None of these cases directly raised a question of full faith and credit, but they all furnish support for the proposition that a state court injunction significantly impairing a nonparty's federal court litigation rights should not be accorded full faith and credit.

authorities by arguing that the Michigan decree is less intrusive than an antisuit injunction. GM Br. 26-27.[19] But GM's assertion is far from self-evident. From the perspective of federal judicial integrity, it might well be worse to render a flawed judgment without the benefit of probative evidence than not to adjudicate the tort suit at all. From the Bakers' perspective, the potential loss of a punitive damages claim based on Elwell's testimony is plainly substantial. Moreover, GM has no explanation of why federal law should turn on subjective assessments of what in many cases will be matters of degree. To say that substantial interference with these litigating rights is not comparable to denial of access to a federal forum is to depend on a formal distinction without substance. The importance of protecting "[t]he federal system [a]s an independent system for administering justice to litigants who properly invoke its jurisdiction," *Byrd*, 356 U.S. at 537, extends not simply to access to a federal forum but also to the critical incidents of litigation (here, the use of available evidence to prove one's case in accord with the Federal Rules of Evidence), and to features such as the federal policy favoring jury decisions of disputed fact questions. *E.g.*, *Byrd*, 356 U.S. at 538.

Certainly nothing in the constitutional history of Art. IV, § 1 suggests that § 1738 was meant to have the radical effect GM supposes. GM Br. 14-17. The Convention rejected even the lesser step of deeming the rendering state's judgment a judgment of the enforcing state. *Williams v. North Carolina*, 325 U.S. 226, 229 (1945). Delegates warned that "there was no instance of one nation executing judgments of the Courts of another nation." 2 Max Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 448 (1911). Accordingly, Madison and Story detected only a modest change from the Articles of Confederation.[20]

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[19] The Michigan injunction *is* a form of an antisuit injunction: an application for Elwell's testimony pursuant to a subpoena in some pending proceeding (whether a legislative hearing or a tort action) is itself a "suit" and cannot cease being a "suit" by virtue of being embedded in an action for damages. *See* pp. 6-7, *supra*.

[20] Madison's brief discussion focused on the difficulties of enforcing money judgments along the borders of contiguous states. The Federalist No. 42, at 271 (Rossiter ed. 1961). Story noted that the measure was "designed to cure the defects in the existing provision" of the Articles of Confederation, which "did not invariably, and perhaps not generally, receive . . . a construction" under which "the same conclusive effects [were given] to judgments of all the states, so as to promote uniformity." Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 660, at 471-72 (1833).

3. Our argument in no way depends on the status of the injunction under Michigan law. However, GM's position is untenable for the independent reason that, under Michigan law: (i) the Elwell-GM consent decree is not to be treated as a litigated judgment and is not binding on third parties such as the Bakers, and (ii) the consent decree may be modified — as the federal district court in this case held.

a. GM and its amici contend that, under Michigan law, consent judgments are binding on third parties. GM Br. 28, 42; NAM Br. 6-9. Not so. The leading Michigan decision is *American Mut. Liability Ins. Co. v. Michigan Mut. Liability Co.*, 235 N.W.2d 769 (Mich. App. 1975), which held that "[a] consent judgment reflects primarily the agreement of the parties," that "[t]he action of the trial judge in signing a judgment based thereon is ministerial only," and that "[t]he trial judge has not determined the matters put in issue, he has merely put his stamp of approval on the parties' agreement disposing of those matters." *Id.* at 776. For this reason, a consent judgment is not accorded collateral estoppel effect in Michigan, even as between the same parties. *Id.* ("Nothing is adjudicated between two parties to a consent judgment.").[21]

A fortiori, consent judgments are not binding on third parties under Michigan law. Thus, in *Peterson v. City of Lapeer*, 307 N.W.2d 744 (Mich. App. 1981), the court held that a consent judgment between a city and certain defendants was not binding either on subsequent plaintiffs who were not parties to the prior action, "or upon the trial court." *Id.* at 748. *See also Berar*

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[21] *See also Tudryck v. Mutch*, 320 Mich. 99, 105 (1948) (cited NAM Br. 8); *In re Estate of Meredith*, 275 Mich. 278, 289 (1936) (cited NAM Br. 7); *Klawiter v. Reurink*, 492 N.W.2d 801, 802-03 (Mich. App. 1992); *Sylvania v. Berlin Twp.*, 186 Mich. App. 73, 75-76 (1990) (cited NAM Br. 8); *Van Pembrook v. Zero Mfg. Co.*, 380 N.W.2d 60, 67 (Mich. App. 1985); *Goldman v. Wexler*, 333 N.W.2d 121, 123 (Mich. App. 1983); *In re Manuel*, 76 Bankr. 105, 106-07 (E.D.Mich. 1987). *Trendell v. Solomon*, 443 N.W.2d 509 (Mich. App. 1989) (GM Br. 28), did not enforce a consent decree against a third party. Its holding — that a consent judgment could not be set aside merely on motion of one of the parties — is inapposite here. In addition, it was based on the court's survey of "authorities from other jurisdictions," *id.* at 510, not on Michigan precedent.

Enterprises, Inc. v. Harmon, 300 N.W.2d 519, 523 (Mich. App. 1980) (nonparty not subject to collateral estoppel effect of consent decree) (cited at NAM Br. 7).

b. The federal court in Missouri had "'at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.'" PLAC Br. 14 (quoting *Halvey v. Halvey*, 330 U.S. 610, 615 (1947)). "So far as the Full Faith and Credit Clause is concerned, what Florida [rendering state] could do in modifying the decree, New York [forum state] may do." *Halvey*, 330 U.S. at 614.

The district court in this case determined that the Michigan injunction should be modified because experience had shown that it was overbroad and prevented the disclosure of "much discoverable information." Pet. App. 28a. GM insists that the federal court was disabled from doing so by a Michigan procedural rule generally requiring motions for modification to be brought in the issuing court. GM Br. 42-43. That Michigan has decided to designate the issuing court as the tribunal *within Michigan* with primary — although not exclusive[22] — responsibility for overseeing a decree cannot strip courts *outside* Michigan of the corresponding power. Otherwise, Michigan would be able to negate the full faith and credit command that courts outside the rendering state have co-equal authority to modify judgments. This Court has held that local venue rules are *not* entitled to full faith and credit, *see Crider v. Zurich Ins. Co.*, 380 U.S. 39, 41-43 (1965); *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354, 359-61 (1914), and even PLAC acknowledges that rules "designed to 'keep litigation at home'" are not entitled to full faith and credit. PLAC Br. 29.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed insofar as it held that 28 U.S.C. § 1738 prevented Ronald Elwell from testifying in this case.

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[22] *See Huber v. Frankenmuth Mut. Ins. Co.*, 408 N.W.2d 505, 508 (Mich. App. 1987) (cited GM Br. 43; NAM Br. 7, 8, 28) (permitting different, non-issuing court to modify order); *Palmer v. Kleiner*, 210 N.W. 332, 333 (Mich. 1926) (permitting second judge to hear case in which first judge had already issued preliminary injunction).

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NO. 96-953

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1996

KENNETH LEE BAKER, et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Eighth Circuit

BRIEF OF AMICI CURIAE STATES OF MISSOURI, CONNECTICUT, IOWA, MISSISSIPPI, WASHINGTON, WISCONSIN AND THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF PETITIONERS BAKER, ET AL.

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BRIEF *AMICI CURIAE* OF THE STATES OF MISSOURI, CONNECTICUT, IOWA, MISSISSIPPI, WASHINGTON, WISCONSIN AND THE COMMONWEALTH OF MASSACHUSETTS

INTEREST OF AMICI

The undersigned *amici curiae*, the Attorneys General of Missouri, Connecticut, Iowa, Mississippi, Washington, Wisconsin and the Commonwealth of Massachusetts, respectfully submit this brief in support of petitioners Kenneth Lee Baker and Steven Robert Baker, by his next friend, Melissa Thomas. *Amici* have a great and abiding interest in the Full Faith and Credit question currently before this Court.

As constitutional officers of the States they represent, *amici* have the responsibility to defend the values of federalism and to represent the interests of the citizens of their respective States. The decision under review violates rather than promotes the values of federalism. It threatens to undermine the proper enforcement of laws protecting public health, safety, and welfare. And it rests on a misinterpretation of Missouri public policy. Accordingly, the Eighth Circuit's judgment should be reversed.

SUMMARY OF ARGUMENT

I. The Eighth Circuit held that the Full Faith and Credit obligation prohibits a federal court in Missouri from admitting the testimony of a witness who was subject to a Michigan state-court decree enjoining him from testifying. But the petitioners here, plaintiffs in a Missouri federal court proceeding, were not parties or privies in the Michigan state court case and could not — consistent with due process — be bound by the Michigan judgment.

Far from serving the interests of federalism, the decision below threatens them by approving a constitutionally

impermissible interference with judicial proceedings outside Michigan. This interference impairs the interest of each State in the integrity of its own judicial proceedings by commanding the unwarranted exclusion of probative, non-privileged evidence solely as a result of a consent decree in a foreign jurisdiction.

II. If permitted to stand, the decision below would also pose a danger to the proper enforcement of laws protecting public safety. Under the court of appeals' approach, an accused wrongdoer could procure the nationwide silence of witnesses through the device of a consent decree, as GM did here. Moreover, the threat is not limited to private civil litigation; a wrongdoer could purchase the silence of witnesses in civil, administrative, or even criminal proceedings initiated by a State or by a federal agency.

III. The court of appeals premised its decision on a misunderstanding of Missouri public policy. The Eighth Circuit concluded that the Michigan injunction was entitled to Full Faith and Credit because "Missouri public policy embraces the theory of full faith and credit." Cert. App. 14a. It is *not* consistent with Missouri public policy, however, to bind an absent party to a judgment and to deny the public its right to every man's evidence. Missouri public policy lends no support to the decision below.

ARGUMENT

I. THE DECISION BELOW MISINTERPRETS PRINCIPLES OF FEDERALISM AND DUE PROCESS

Due process guarantees that a person "is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Martin v. Wilks*, 490 U.S. 755, 761-62 (1989); *see also Richards v. Jefferson Cnty.*, 116 S. Ct. 1761, 1765-66 (1996); *Hansberry v. Lee*, 311 U.S. 32, 40 (1940).

Yet here the Eighth Circuit held that the plaintiffs could not call a former GM employee as a witness because of a Michigan state court judgment rendered in a proceeding of which the plaintiffs had no notice, in which they did not participate and in which they were not represented in a class action or any other capacity. The Eighth Circuit erred in reading the Full Faith and Credit obligation as compelling such a result. The principles of cooperative federalism embodied in the Full Faith and Credit Clause, Art. IV, §1, and in the Full Faith and Credit statute, 28 U.S.C. § 1738, cannot and do not override fundamental due process guarantees.

The Full Faith and Credit Clause "substituted a command for the earlier principles of comity." *Estin v. Estin*, 334 U.S. 541, 546 (1948). But "[a] state-court judgment generally is not entitled to full faith and credit unless it satisfies the requirements of the Fourteenth Amendment's Due Process Clause." *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873, 884-85 (1996) (Ginsburg, J., concurring in part and dissenting in part). This Court has explained that, in order for a judgment to be entitled to claim full faith and credit,

> [t]he State must . . . satisfy the applicable requirements of the Due Process Clause. A State may not grant preclusive effect in its own courts to a constitutionally infirm judgment, and other state and federal courts are not required to accord full faith and credit to such a judgment. Section 1738 does not suggest otherwise; other state and federal courts would still be providing a state court judgment with the "same" preclusive effect as the courts of the State from which the judgment emerged. In such a case, there could be no constitutionally recognizable preclusion at all.

Kremer v. Chemical Constr. Corp., 456 U.S. 461, 482-83 (1982).

Thus, the Full Faith and Credit obligation has always been understood to be "subject to the requirements of" due process. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985). *See also Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986) (quoting *Marrese*); *McDonald v. Mabee*, 243 U.S. 90, 92 (1917) ("[A]n ordinary personal judgment for money, invalid for want of service amounting to due process of law, is as ineffective in the State as it is outside of it").

There is no reason to depart from this settled principle here. The values of cooperative federalism and comity embodied in the Full Faith and Credit Clause and statute does not permit that a judgment be binding against a nonparty unrepresented in the previous action. To the contrary: "Both the Due Process and Full Faith and Credit Clauses ensure that the States do not 'reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.'" *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 334 (1981) (Powell, J., dissenting, joined by Burger, C.J., and Rehnquist, now C.J.) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

Thus, the decision below positively *disserves* the values of federalism by sanctioning an unwarranted inference with judicial proceedings outside Michigan. Although in this case the issue arose in a federal district court, the Full Faith and Credit Clause applies equally to state courts. If the Eighth Circuit's analysis is accepted, this limitation on evidence would be applied in the future in state court actions. Each State has a fundamental interest in the integrity of its judicial proceedings. The exclusion of probative, non-privileged evidence solely as a result of a consent decree in a foreign jurisdiction impairs the search for truth and creates too great a risk that the State's own

judicial processes might be used as an instrument of injustice. As one court reasoned in permitting the testimony of Ronald Elwell — the former GM employee involved in this case — the Michigan injunction "prevents the jury from making a determination based upon all the relevant, admissible evidence. The effect is an obscured search for truth." *Hannah v. General Motors Corp.*, No. Civ. 93-1368 PHX RCB, slip op. at 5 (D. Ariz. May 30, 1996). Another court concluded that the injunction "not only violates our fundamental public policy against suppression of evidence," but also "would undermine the fundamental integrity of this state's judicial system." *Smith v. Superior Court*, 49 Cal. Rptr. 2d 20, 27 (Cal. App. 5th Dist. 1996), *review denied*, 1996 Cal. LEXIS 2185 (Cal. Apr. 18, 1996).

In the ordinary case, states have an important interest in the extraterritorial recognition of their judgments by sister states. This interest is reflected in Art. IV, § 1 and 28 U.S.C. § 1738. The instant controversy, however, is not an ordinary case. Here, countervailing interests — including fundamental principles of both due process and federalism — show that the Michigan injunction at issue was not entitled to Full Faith and Credit.

II. THE DECISION BELOW REPRESENTS A DANGER TO THE PROPER ENFORCEMENT OF STATE LAWS PROTECTING PUBLIC HEALTH, SAFETY, AND WELFARE

The Eighth Circuit held that, under the Full Faith and Credit obligation, the Michigan state court injunction precludes petitioners from obtaining Mr. Elwell's testimony in a federal court in Missouri. This decision, if permitted to stand, would give wrongdoers a simple guide to hampering or even effectively preventing litigation against them: by procuring the

silence of adverse witnesses through consensual or contested injunctions before a judge in a chosen locale. Any wrongdoer could duplicate GM's strategy.

The underlying decision poses a particular threat to state law enforcement efforts. Employees and company insiders frequently provide critical information in environmental, anti-trust, consumer protection, medicaid fraud and many other kinds of state investigations. GM's brief in opposition to certiorari provides one example of how Full Faith and Credit can be used to limit state law enforcement efforts. GM pointed to tobacco litigation and the efforts of Brown & Williamson to enforce a Kentucky state court injunction against Jeffrey Wigand, a former vice president for research & development at Brown Williamson. The tobacco company sought to prevent Mr. Wigand from testifying in a lawsuit brought by the State of Mississippi in Mississippi state court.

Further examples highlight the extent of the danger posed by the decision below. In *EEOC v. Astra USA, Inc.*, 94 F.3d 738 (1st Cir. 1996), for instance, the First Circuit invalidated a provision of an employment discrimination settlement in which the plaintiff agreed not to cooperate with the EEOC's sexual harassment investigation involving other employees. The court explained that, when approached by the EEOC, the plaintiff stated "that she possessed relevant information but was unable to disclose it 'due to a confidential settlement agreement that she had entered into with Astra.'" *Id.* at 741. "[W]hen the EEOC contacted ninety employees and requested information, only twenty-six replied." *Id.* The court explained that such provisions in settlements were void as against public policy:

> Clearly, if victims of or witnesses to sexual harassment are unable to approach the EEOC or even to answer its questions, the investigatory powers that Congress conferred would be sharply curtailed and the efficacy of

> investigations would be severely hampered. . . . In many cases of widespread discrimination, victims suffer in silence. In such instances, a sprinkling of settlement agreements that contain stipulations prohibiting cooperation with the EEOC could effectively thwart an agency investigation.

Id. at 744. The court added that the right to provide truthful information to the EEOC "is not a right that an employer can purchase from an employee, nor is it a right that an employee can sell to her employer." *Id.* at 744 n.5.

Similarly, in *Hamad v. Graphic Arts Center, Inc.*, 72 Fair Empl. Prac. Cases (BNA) 1759 (D. Or. Jan. 3, 1997), a district court refused to enforce a secrecy provision in a settlement agreement between a company and a former employee when the latter was called to testify in a racial discrimination case. The court explained that "any provision in the settlement agreement which prohibits [the former employee] from testifying as required by the subpoena are against public policy and therefore void."

The logic of *Astra* and *Hamad* is squarely applicable here. Yet under the Eighth Circuit's approach, the non-cooperation agreements in *Astra* and *Hamad* would have been binding if they had been memorialized in a consent decree, like the agreement between Elwell and GM. Unless the decision below is reversed, in the future wrongdoers will evade holdings like *Astra* and *Hamad* by including noncooperation agreements in consent decrees before friendly courts.

The danger posed by the Eighth Circuit decision is most obvious in cases involving former and current employees, but its effect is not limited to those situations. Unless the Eighth Circuit's decision is corrected, there is every reason to think that wrongdoers would begin to negotiate secrecy agreements

involving third-party witnesses.

In short, the threat to the public welfare is plain. The Eighth Circuit's decision should not be permitted to stand.

III. THE DECISION BELOW MISCONSTRUES MISSOURI PUBLIC POLICY

The Eighth Circuit premised its decision on the view that "Missouri public policy embraces the theory of full faith and credit." Cert. App. 14a. But the court of appeals failed to consider the matter in context. Although Missouri has adopted the Uniform Enforcement of Foreign Judgments Act, *see* Mo. Rev. Stat. §§ 511.760, 511.778, Missouri law, of course, has long recognized — in accordance with the Federal Constitution — that courts may not give full faith and credit to judgments of sister state courts where those judgments are sought to be applied in violation of due process. "That which was done in violation of the due-process clause, is not entitled to be enforced under the full-faith-and-credit clause." *Hall v. Wilder Mfg. Co.*, 293 S.W. 760, 762 (Mo. 1927). *See, e.g., Fisk v. Wellsville Fire Brick Co.*, 152 S.W.2d 113, 118 (Mo. 1941) (Illinois judgment not entitled to full faith and credit where defendant did not enter an appearance and was not properly served in foreign action); *Adamson v. C.G. Harris*, 726 S.W.2d 475, 477 (Mo. Ct. App. 1987) ("'A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere. . . . Due process requires that the defendant . . . be subject to the personal jurisdiction of the court . . . . '") (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980)).

Thus, even a *party* to a prior proceeding may not be held to a full faith and credit obligation under the Missouri statute by demonstrating that it was not given "due notice" in the prior proceeding. *In re Veach*, 287 S.W.2d 753, 759 (Mo. 1956);

Bastian v. Tuttle, 606 S.W.2d 808, 809 (Mo. Ct. App. 1980); *Corning Truck & Radiator Service v. J.W.M., Inc.*, 542 S.W.2d 520, 524 (Mo. Ct. App. 1976); *see also Campbell v. Campbell*, 780 S.W.2d 89, 91 (Mo. Ct. App. 1989) ("Foreign judgments do not qualify for registration under Missouri's Uniform Act unless they are entitled to full faith and credit under the Full Faith and Credit Clause of the Federal Constitution. And, that Clause does not compel a state court to extend full faith and credit to the judgment of a sister state whose rendering court failed to give notice consistent with the procedural due process guaranteed by the Fourteenth Amendment of the Federal Constitution.") (citation omitted).

A fortiori, Missouri law and public policy recognize that a person who is not even a *party* in the prior proceeding cannot be bound by the foreign judgment.

Further, Missouri recognizes the important public policy interest in the disclosure of all relevant, non-privileged information. Under Missouri law, a party should be provided "with access to anything that is 'relevant' to the proceedings and subject matter not protected by privilege." *State v. Koehr*, 831 S.W.2d 926, 927 (Mo. 1992) (en banc). Missouri Rule of Civil Procedure 56.01(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action."

Missouri is not alone in recognizing that the state has a strong public policy interest in the disclosure of relevant, non-privileged information. Numerous lower courts have permitted Mr. Elwell to testify as to non-privileged, non-trade-secrets information within his knowledge, on the ground that the public policy of full discovery and disclosure demands such a result. *See, e.g., Ake v. General Motors Corp.*, 942 F. Supp. 869, 881 (W.D.N.Y. 1996) (specifically declining to follow the Eighth

Circuit's decision for this reason); *Williams v. General Motors Corp.*, 147 F.R.D. 270, 273 (S.D. Ga. 1993) ("This Court concludes that the public interest — which must be weighed in any consideration of injunctive relief — is not served in this instance by prohibiting Elwell from testifying in Georgia as to matters not within the scope of an attorney-client or work-product privilege, or which divulgence would not constitute misappropriation of a trade secret. Any interest GM might have in silencing Elwell as to unprivileged or non-trade-secret information is outweighed by the public interest in full and fair discovery."); *Bishop v. General Motors Corp.*, No. 94-286-S, slip op. 2 (E.D. Okla. June 29, 1994) ("to the extent the Michigan injunction prohibits Elwell from testifying to matters outside the scope of any privilege, or with respect to trade secrets, it violates Oklahoma and federal court public policy of full discovery"); *Ruskin v. General Motors Corp.*, No. CV930073883, 1995 WL 41399, *2 (Conn. Super. Ct.) (Jan. 25, 1995) ("the Michigan injunction involves a blanket prohibition that contravenes Connecticut public policy"); *Kibler v. General Motors Corp.*, No. C94-1494R, slip op. 2 (W.D. Wash. July 10, 1996) (noting "Washington's strong public policy in favor of full disclosure in the search for truth at trial").

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed insofar as it held that the Full Faith and Credit obligation prevented Ronald Elwell from testifying in this case.

Respectfully submitted.

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May 23, 1997

(7)

No. 96-653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH LEE BAKER AND STEVEN ROBERT BAKER,
BY HIS NEXT FRIEND, MELISSA THOMAS
Petitioners,

VS.

GENERAL MOTORS CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court of Appeals for the Eighth Circuit

---

BRIEF OF AMICUS CURIAE THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITIONERS

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STATEMENT OF INTEREST

The Association of Trial Lawyers of America ["ATLA"] is a national bar association of more than 50,000 attorneys who primarily represent plaintiffs in personal injury actions, including injury or death caused by unreasonably dangerous and defective products. Letters of consent from the parties have been filed with the Court.

ATLA firmly believes that access to the courts for legal redress of wrongs is essential to our system of government. To enforce private agreements designed to deprive the courts of relevant evidence permits powerful private interests to manipulate the justice system. ATLA further believes that litigation serves a vital function of uncovering information that may be of crucial importance to the public. For this reason, ATLA has worked to eliminate confidentiality agreements that permit parties to hide information from the public involving matters of health and safety.

SUMMARY OF THE ARGUMENT

The court below erred in concluding that the Full Faith and Credit Clause required the district court to enforce the Michigan injunction upon demand by GM. Although the Clause requires a court to respect a judgment entered by the court of another state, the forum state retains the power to decline to enforce a judgment that violates the state's own laws or public policy.

The court below has imposed a novel remedy for violation of an injunction. In addition to contempt proceedings against the violator, the lower court held that testimony violative of the injunction is inadmissible in an unrelated civil action. In effect, the decision below permits private litigants to purchase a privilege to prevent adverse testimony.

By enforcing a private agreement that a witness with relevant evidence shall not testify the lower court's decision contravenes important public policies. The principle that the courts are entitled to every person's testimony is essential to the administration of justice.

In addition, permitting a private litigant to bar adverse testimony violates the strong public policy favoring openness of the courts and makes the civil justice system an instrument to the concealment of information affecting public health and safety.

ARGUMENT

I. THE FULL FAITH AND CREDIT CLAUSE DOES NOT REQUIRE THE EXCLUSION OF TESTIMONY BY A WITNESS WHO HAS BEEN ENJOINED FROM TESTIFYING BY A COURT OF ANOTHER STATE.

The issue in this case is stark and reaches to the very foundations of the role of the judicial branch of our government. The decision below sets aside the principle that the courts are entitled to every person's testimony, *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972). Instead, the lower court held that an agreement between private parties that one will not testify against the other is binding on all courts, rendering such testimony inadmissible in a civil action by a third party.

A. Violation of a Court Order Prohibiting an Expert From Testifying Subjects the Expert to Penalties, But Does Not Render Such Testimony Inadmissible in All Courts.

Plaintiffs' mother was burned to death when the Chevrolet Blazer in which she was riding caught fire after a collision. Their products liability action against General Motors Corporation alleged that the vehicle was defectively designed with the result that the fuel pump continued to pump gasoline to the engine after impact.

The number of persons who can testify with expertise on the design of the GM fuel pump system is limited. One is

Ronald Elwell, a former GM employee who studied fuel-fed fires in GM vehicles and recommended design changes. Elwell testified that a defect in the fuel pump system contributed to the fire in this case. The jury returned a verdict against GM.

The Eighth Circuit reversed, in part on the ground that the district court should not have permitted Elwell to testify. Elwell had previously sued GM over his discharge by the company. The parties reached a settlement of these and other claims. As part of their agreement, GM and Elwell stipulated to the entry of an injunction prohibiting Elwell from testifying in any products liability case against GM without its consent. The Eighth Circuit held that the Full Faith and Credit Clause, U.S. Const., art. IV, §1, required the district court to exclude Elwell's testimony.

Contrary to the characterization by the court below, this is not a case in which the district court refused to give full faith and credit to the Michigan injunction. The Full Faith and Credit Clause, and its enabling statute 28 U.S.C. §1738, requires the forum court to give the same effect to a judgment that it would receive in the foreign jurisdiction. If General Motors had initiated contempt proceedings in a Missouri court against Elwell for violation of the Michigan injunction, the Missouri court would be faced with the obligation to give the injunction full faith and credit. The Michigan order did not purport to prohibit the courts of Michigan or elsewhere from admitting Elwell's testimony.

Amicus submits that the Eighth Circuit erred in determining that to give full faith and credit to the Michigan order judges in products liability actions against GM must rule Elwell's testimony inadmissible on demand by GM. Such an "exclusionary rule," is not a provision of the Michigan injunction. Rather, it is was created by the lower court as punishment for violation of the injunction -- in addition to the availability of contempt sanctions against Elwell himself --

directed at innocent third parties. Amicus further submits, in Part II below, that this novel privilege of a party to exclude testimony based on a private agreement, violates strong public policies.

B. The Full Faith and Credit Clause Does Not Require Automatic Enforcement of All Judgments Entered by Another State.

Even accepting the Eighth Circuit's characterization of the Michigan order as including not only the availability of sanctions against Elwell but also the inadmissibility of his otherwise relevant and non-privileged testimony, the court erred in holding that the order was entitled to strict and rigid enforcement. In the Eighth Circuit's view, the only valid bases for permitting Elwell to testify would be a finding of "lack of jurisdiction over the subject matter, failure to give due notice, or fraud in concoction of the judgment." Pet. at 14a. Amicus suggests that the Full Faith and Credit Clause does not entitle a state court to automatic and unquestioned enforcement of its orders by every other court in the land.

This Court has pointed out that the Full Faith and Credit Clause "does not require a State to apply another State's law in violation of its own legitimate public policy." *Nevada v. Hall*, 440 U.S. 410, 422 (1979). *See also Pacific Employers Ins. Co. v. Industrial Accident Comm'n*, 306 U.S. 493, 502 (1939). This flexibility stems from the fact that the forum state is also sovereign in its own right. For this reason, "there are some limitations upon the extent to which a state may be required by the full faith and credit clause to enforce even the judgment of another state in contravention of its own statutes or policy." *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 294 U.S. 532, 546 (1935). In appropriate cases, the forum may attach paramount importance to its own legitimate interests. *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 323 (1981) (Stevens, J., concurring). On this basis, for example,

the federal district court of Colorado rejected GM's contention that the Michigan injunction rendered Elwell's testimony inadmissible in a products liability action there. Such a result, the court held, would do violence to the sovereign interests of Colorado and would violate its public policy. *Bray v. General Motors Corp.*, No. 93-C-2656, (D. Colo., Jan. 20, 1995) p.5.

Where, as here, the foreign judgment represents an exercise of the equitable jurisdiction of the foreign court, the forum court should possess even broader discretion to tailor its enforcement in light of sound public policy. This Court has not squarely held that a state court is obligated to give full faith and credit to a permanent injunction from a sister state[1]. Assuming that the Full Faith and Credit Clause applies, however, it is well settled that courts possess the inherent power to modify an injunction when it is "satisfied that what it has been doing has been turned into an instrument of wrong." *United States v. Swift*, 286 U.S. at 114-15. Hence, "when the judgment includes an injunction of prospective effect [it] must be balanced against the need, in sound judicial discretion to modify a continuing injunction when circumstances have sufficiently changed." *W.L. Gore & Assoc. v. C.R. Bard, Inc.*, 977 F.2d 558, 561 (Fed. Cir. 1992), *citing System Fed'n No. 91 v. Wright*, 364 U.S. 642, 647-48 (1961). Moreover, "[T]he State of the forum has at least as much leeway to disregard the judgment, qualify it, or depart from it as does

[1] As recognized by the *Restatement (Second) of Conflict of Laws* § 102, the issue of whether injunctions are entitled to full faith and credit remains open:

> The Supreme Court of the United States has not had occasion to determine whether full faith and credit requires a State of the United States to enforce a valid judgment of a sister State that orders the doing of an act other than the payment of money or that enjoins the doing of an act. No definite statement on the point is therefore made in the rule of this Section.

Restatement (Second) of Conflict of Laws § 102, cmt c.

the state where it was rendered." *Halvey v. Halvey*, 330 U.S. 610, 615 (1947).

In the exercise of this discretion, other courts have modified the Michigan order to permit testimony by Elwell. See *Williams v. General Motors Corp.*, 147 F.R.D. 270, 272-73 (S.D. Ga. 1993); *Meenach v. General Motors Corp.*, 891 S.W.2d 398, 401 (Ky. 1995); *Shoemaker v. General Motors Corp.*, No. 91-0990-CV-W-8 (W.D. Mo., June 18, 1993).

The injunction entered upon the agreement between Elwell and GM clearly implicates the rights of persons who were not represented at that proceeding. At least 30 state and federal courts have been asked by GM to preclude Elwell from participation in civil suits involving third parties.[2] *See* Pet. at 24 ("Addendum"), summarizing cases. The Eighth Circuit is the only appellate court to conclude that the Full Faith and Credit Clause required exclusion of Elwell's testimony.

C. The Court Below Erred in Requiring Exclusion of Evidence as a Remedy for Violation of the Injunction.

ATLA respectfully submits that the issue in this case is not whether the district court gave full faith and credit to the Michigan injunction. The injunction was directed at Elwell. The appropriate remedy for Elwell's violation of that injunction would be a contempt proceeding against him. The Michigan order did not enjoin other courts from permitting Elwell to testify in other civil actions. Nor could a Michigan court bind the courts of other states by such an order. *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

[2] These decisions include seven appellate court opinions and 22 trial court decisions.

The Eighth Circuit in this case fashioned a new and additional remedy for violation of the injunction. In addition to punishing Elwell for violating the order, the court held that third parties must be deprived of any advantage gained by the violation. The court held that testimony violating the injunction is inadmissible in an action by a third party and its introduction may constitute reversible error.

In *Trammel v. United States*, 445 U.S. 40 (1980), this court held that the long-recognized privilege of a husband or wife to prevent adverse testimony from the spouse was no longer consistent with public policy. Nevertheless, in this case, the Eighth Circuit has permitted GM to purchase a privilege to prevent adverse testimony by its former employee. The court further held that GM could make its private agreement binding on every court in the land through the simple expedient of incorporating it into a stipulated injunction.[3]

ATLA suggests that to permit private parties to agree not to testify contravenes strong public policies.

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[3]A consent judgment entered pursuant to a compromise agreement, not based upon any finding of fact or determination on the merits is not a judicial determination by the court of any litigated right. In entering it, the court merely exercises an administrative function in recording what has been agreed to between the parties. *Ridley v. Phillips Petroleum Co.*, 427 F.2d 19 (10th Cir. 1970) This corresponds to the view in Michigan that:

> The action of the trial judge in signing a judgment based [on the partys' agreement] is ministerial only. The parties have not litigated the matters put in issue, they have settled. The trial judge has not determined the matters put in issue, he has merely put his stamp of approval on the parties' agreement disposing of those matters.

American Mut. Liab. Insur. Co. v. Michigan Mut. Liab. Co., 235 N.W.2d 769 (Mich. Ct. App. 1975).

II. PERMITTING PRIVATE PARTIES TO PREVENT COURTS FROM ADMITTING OTHERWISE RELEVANT TESTIMONY VIOLATES IMPORTANT PUBLIC POLICIES

Whether the decision below is deemed to be an application of the Full Faith and Credit Clause, which accords the forum court discretion to tailor its enforcement to protect state public policy, or whether the Eighth Circuit is deemed to have engrafted an exclusionary rule onto the Clause to further state policy, the Eighth Circuit erred. The court relied on its own conclusory assertion that "Missouri's interest in full and fair discovery [does not override] its interest in giving full faith and credit to a sister state's judgment." Pet. at 14a.

The lower court proffered no explanation of the surprising assertion that the state of Missouri has a strong interest in enforcing an order entered by a Michigan court that deprives Missouri residents, who did not participate in the Michigan action, of critical evidence in a civil suit governed by Missouri law, arising out of the death of a Missouri resident on a Missouri highway. Amicus suggests that Missouri's scant interest in allowing its residents to be penalized for Elwell's violation is far outweighed by Missouri's strong interest in the operation of its own judicial system and the public policy favoring disclosure of information affecting public health and safety.

A. Permitting Private Parties to Render Relevant Testimony Inadmissible By Private Agreement Undermines the Independent Administration of Missouri's Judicial System

The question of what evidence can be heard in a court of law touches on fundamental issues of a states' sovereign control of the administration of its judicial system.

Addressing the threat posed by the Michigan order involved in this and many other civil actions, the district court of Arizona stated:

> The court, indeed every court throughout the nation, exists to serve the ends of justice. When a case cannot be resolved through motion practice this job invariably turns from an analysis of legal principles to a search for the truth. At that point the court must serve as a gatekeeper of evidence; allowing in all that conforms to the web of procedural and evidentiary rules that govern modern litigation. These rules have evolved over time to ensure that the facts presented to the jury are untainted by prejudice or bias ... The Michigan injunction usurps these rules by keeping out *all* of Elwell's testimony. This in turn prevents the jury from making a determination based upon all the relevant, admissible evidence. The effect is an obscured search for truth. As the California Court of Appeals aptly observed when confronted with this issue, "recognition of the injunction would undermine the fundamental integrity of [California's] judicial system." *Stephens v. Superior Ct.*, 49 Cal. Rptr. 2d 20, 27 (Cal. Ct. App. 1996).

Hannah v. General Motors Corp., No. 93-1368 PHX RCB (D.Ariz., May 30, 1996) at p.4-5.

B. Permitting a Litigant to Purchase the Right to Prevent Testimony Concerning Matters Affecting Public Health or Safety Violates Public Policy.

The Michigan injunction, as enforced by the Eighth Circuit, permits GM to prevent a court from receiving

evidence which is harmful to its case. But its effects reach far beyond the courtroom. Thousands of other drivers or passengers in GM vehicles may be at risk of the same tragedy that befell plaintiffs' mother. Permitting GM to conceal information regarding a possible hazard may reduce the ability of consumers, federal safety regulators, or others in the industry to assess the danger and take corrective action. The business of the courts is the public's business. Amicus submits that the courts must not participate in the concealment of potential dangers to the public

The attempt by General Motors to use the courts to conceal information concerning potential dangers to the public is part of a disturbing trend. The past decade has seen a dramatic increase in the use of protective orders and secrecy agreements in civil suits designed to hide information from the public. *See* Lloyd Doggett & Michael Mucchetti, *Public Access to Public Courts: Discouraging Secrecy in the Public Interest*, 69 Tex. L. Rev. 643 (1991). Investigative journalists have uncovered a disturbing number of instances in which parties have used the courts to hide dangerous products, environmental pollution, medical negligence and other dangers from public view. *E.g.*, Elsa Walsh & Benjamin Weiser, *Public Courts, Private Justice: Court Secrecy Masks Safety Issues*, Washington Post, Oct. 23, 1988, at A1, col. 3; Barry Meier, *Deadly Secrets: System Thwarts Sharing Data on Unsafe Products*, Newsday, Apr. 24, 1988, at 24; Steve McGonigle, *Secret Lawsuits Shelter Wealthy, Influential*, Dallas Morning News, Nov. 22, 1987, at A1.

Although businesses may require a measure of secrecy to foster innovation and competition, hiding public hazards can be deadly. The free flow of information concerning potentially dangerous products is essential to public health and safety and to the just and efficient operation of the civil justice system. Secrecy, whether by agreement of the parties or protective orders, undermines this principle.

The Federal Rules of Civil Procedure establish a presumptive right of public access to information disclosed during discovery in civil actions. It is well settled that "[t]o overcome the presumption [of public access], the party seeking the protective order must show good cause by demonstrating a particular need for protection. A party seeking a protective order bears the burden of establishing good cause. Broad allegations of harm, unsubstantiated by specific examples of articulated reasoning, do not satisfy the Rule 26(c) test. Moreover, the harm must be significant, not a mere trifle." *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986); *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982); Note, *Protective Orders and the Use of Discovery Materials Following* Seattle Times, 71 Minn. L. Rev. 171, 172 n.3 (1986).

Where the information defendant seeks to conceal concerns a present danger to the health and well-being of other persons, the interest in full disclosure of the hazard outweighs even legitimate economic interests of the defendant.

> Discovery may well reveal that a product is defective and its continued use dangerous to the consuming public. . . . It is inconceivable to this Court that under such circumstances the public interest is not a vital factor to be considered in determining whether a court should be a party to that concealment.

Cipollone v. Liggett Group, Inc., 113 F.R.D. 86, 87 (D.N.J. 1986). *See also In re Agent Orange Prod. Liab. Litigation*, 104 F.R.D. 559, 572 (E.D.N.Y. 1987), *aff'd*, 821 F.2d 139 (2d Cir. 1987)(blanket protective order lifted due to public interest in issue affecting health of veterans and their families); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165

(6th Cir. 1983)(ordering disclosure of tar and nicotine content of cigarettes in view of public interest in health matters); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 8 (1st Cir. 1986)(order permitting plaintiff to disclose to governmental authorities discovery information regarding toxic chemicals in the city's water supply because "public interest required that information bearing on this problem be made available to those charged with protecting the public's health.")

In this case, Amicus argues that the public interest in protecting health and safety and in the just and efficient resolution of civil actions outweigh any interests in enforcing an injunction whose sole objective is to keep critical and possibly incriminating information secret. Employer/employee secrecy arrangements have generally been disfavored by courts that have had the occasion to consider them. For instance, in *Chambers v. Capital Cities*, the court stated:

> It has been recognized that at least in some circumstances, agreements obtained by employers requiring former employees to remain silent about underlying events leading up to disputes, or concerning potentially illegal practices ... can be harmful to the publics ability to rein in improper behavior, and in some contexts the ability of the United States to police violations of its laws.

Chambers v. Capital Cities, 159 F.R.D. 441, 444 (S.D.N.Y. 1995).

This strong public policy favoring openness of the courts is particularly strong in products liability cases, which frequently involve dangers to persons beyond the parties to the lawsuit. As stated by one federal district court refusing to exclude Mr. Elwell's testimony under the Michigan injunction:

> Any interest GM might have in silencing Elwell as to unprivileged or non-trade-secret matters is outweighed by the public interest in full and fair discovery.

Williams v. General Motors Corp., 147 F.R.D. 270, 273 (S.D.Ga.1993).

CONCLUSION

For these reasons, ATLA urges this Court to reverse the judgment Court of Appeals for the Eighth Circuit and reinstate the judgment of the district court entered upon the jury's verdict.

Respectfully submitted,

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May 23, 1997

(8)

No. 96-653

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Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF CENTER FOR AUTO SAFETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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Amicus curiae respectfully submits this brief in support of the Petitioner. Letters of consent to the filing of this brief from the Petitioner and the Respondent have been filed with the Clerk.

STATEMENT OF INTEREST

Amicus curiae, Center for Auto Safety, files this brief to ensure that the Court is aware of the implications of the ruling in the court below. The Court's decision in this case will have a substantial impact not only on the future conduct of this particular case and any other suit involving General Motors Corporation in which Ronald Elwell could be called upon as a witness, but also on any lawsuit or government investigation into a matter on which a "whistleblower" might shed some light. In this respect, the ultimate resolution of the issues now before the Court will bear upon a wide range of circumstances, both within and outside of the automotive industry.

Center for Auto Safety ("CAS") is a nationwide, nonprofit consumer advocacy organization incorporated under the laws of the District of Columbia. Since its founding in 1970, CAS has worked toward improved safety, environmental responsibility, and fair dealing in the car industry. CAS has a distinguished track record of petitioning Federal agencies, including, most prominently, the National Highway Traffic Safety Administration ("NHTSA"), for rulemakings and enforcement actions. CAS played a substantial role in bringing about the recalls of 7 million Chevrolet vehicles for defective engine mounts in 1971, 15 million Firestone 500 tires for tread separation in 1978, 3.7 million Evenflo child seats for latch buckle defects in 1990, and 1.2 million Ford Pintos for their deadly fuel tank defect.

CAS has a particular interest in this litigation as a consequence of our involvement in the inquiries into the safety of the 1973-1987 General Motors pickup trucks with the so-called "sidesaddle" fuel tank configuration. We filed

the petition with NHTSA that resulted in an investigation into the safety of these trucks, an initial finding of the presence of a safety-related defect, and ultimately a settlement of that investigation.

It was a personal injury suit involving one such truck which led General Motors to pursue the Michigan court injunction at issue here. Ronald Elwell's testimony in that suit, *Moseley v. General Motors Corp.*, and others has provided substantial insight into General Motors' knowledge of the fuel tank defect and General Motors' attempts to prevent that defect from coming to light.

SUMMARY OF ARGUMENT

If the Court upholds the decision of the Eighth Circuit and thus permits the Michigan court injunction to bind litigants in other courts who were not party to the injunction proceeding, it will have at least two pernicious effects: First, and more significantly, by eliminating any inquiries into the General Motors corporate engineering knowledge of Ronald Elwell, it will substantially impair inquiries into (A) two of the most significant safety areas in all General Motors vehicles, fuel system integrity and occupant ejection, and (B) two of the most serious safety defects in automotive history, sidesaddle gas tanks on 10 million 1973-87 General Motors pickups that explode in crashes and Type III door latches on 40 million 1978-87 cars and trucks that open in crashes. Second, it will prevent any investigation into what, if any, of the information held by Ronald Elwell is actually entitled to attorney/client or work product protection in light of the crime/fraud doctrine.

Upholding the Michigan court's injunction would needlessly silence testimony that is clearly not subject to any claim of privilege. The broad language of the injunction bars Mr. Elwell from testifying not only to matters which would

comprise attorney/client communications, attorney work product, or trade secrets, but to any matter whatsoever in litigation involving General Motors. In the absence of a modification by the issuing court or consent of General Motors, the gag remains in effect. The injunction thus deprives both the General Motors sidesaddle gas tank defect burn victims and the Type III door latch ejection victims of evidence to which they are by all rights entitled.

Moreover, one of the most hard-fought battles in the already rancorous personal injury litigation involving the fuel system defect in the 1973-1987 General Motors pickup trucks has focused on whether attorneys representing General Motors (or General Motors employees working with those attorneys) assisted General Motors in the commission of a crime or a fraud, thus abrogating the attorney/client privilege. Parties raising this argument against General Motors have relied heavily on the damning revelations contained in Mr. Elwell's testimony. The Michigan injunction puts an end to such inquiries, regardless of their merits. In one fell swoop, the injunction both assumes the validity of General Motors' attorney/client privilege claims, and effectively prevents a litigant from obtaining and introducing evidence to refute that assumption.

ARGUMENT

I. TO GIVE EFFECT TO THE MICHIGAN INJUNCTION WOULD SHIELD INFORMATION FOR WHICH RESPONDENT HAS NO LEGITIMATE CLAIM TO PROTECTION

The decision in this case not only will determine whether Petitioners can rely on the testimony of Ronald Elwell, but it will also affect the rights of virtually all the victims in two of the most contentious series of product liability suits in recent memory. General Motors wants to

silence Ron Elwell from testifying about two major safety areas in which he has particular expertise because of his engineering experience gained while employed at General Motors for nearly 30 years. The first area is fuel-fed fires in motor vehicles, which account for about 4% of all passenger car and 5% of all light truck occupant deaths. Despite the adoption of an upgraded Federal Motor Vehicle Safety Standard 301, "Fuel System Integrity," the number of fire-related fatalities in crashes has increased from 1,300 in 1975 to over 1,800 in 1988.[1] The second area is occupant ejection through doors opening due to latch failure. In 1995, 9,257 vehicle occupants were killed when ejected through windows, doors, and other vehicle openings in crashes.[2]

The injunction which is the subject of this case grew out of a concern about the disclosure of information Mr. Elwell had obtained during his employment relevant to the safety of the fuel system of the company's 1973-1987 full-size pickup trucks. The fuel tanks on these trucks were not located between the sturdy frame rails of the vehicle, but rather were in a "sidesaddle" configuration — on the outside of the frame, between the body and the frame rail. The result of this unfortunate placement was an increase in the likelihood of post-collision fuel-fed fires in certain types of accidents. In 1995, one court found 183 "substantially similar incidents" involving these trucks. That is, the court found 183 accidents involving the same made and model of truck, with the same fuel system configuration, where the fuel tank(s) ruptured, fuel leaked, and a subsequent fire with injury resulted. *See* Order at 6 in *Bishop v. General Motors*

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[1]National Highway Traffic Safety Administration, "Motor Vehicle Fires in Traffic Crashes and the Effects of the Fuel System Integrity Standard," HS 807 675, p. xviii (November 1990).

[2] National Highway Traffic Safety Administration, "Traffic Safety Facts 1995," HS 808 471 at 103 (September 1996).

Corp., No. CIV-94-286-B (E.D. Okla., Aug. 1, 1995). Even former General Motors Chairman Robert Stempel testified in 1991 that the fuel tank defect had been the subject of at least eighty lawsuits. *See* Deposition of Robert C. Stempel at 58 in *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga., Oct. 30, 1991).

The injunction also impacts upon a group of lawsuits concerning the adequacy of General Motors' Type III door latch. During a ten year period lasting from the late 1970s through the late 1980s, General Motors manufactured approximately 40 million vehicles with these latches. In certain accidents, the impact forces cause the latch mechanism to deform in such a way that the fork bolt (the moving portion of the mechanism inside the door used to hold the door closed) "bypasses" the detent lever (the portion of the mechanism inside the door holding the fork bolt in the "closed" position). When this bypass occurs, the door opens freely, creating a substantially heightened risk of ejection and, hence, serious injury or death. General Motors has settled at least 55 suits arising out of this defect for a total of $67 million. *See* Order in *Hardy v. General Motors Corp.*, Case Nos. CV-93-56, -57 (Lowndes Cty. Cir. Ct., Ala., Oct. 23, 1996).

The Michigan court's injunction provides one glimpse of a course of conduct in which General Motors has engaged in an attempt to obfuscate the issues surrounding both the truck defect and the latch defect. General Motors has persistently missed deadlines, refused to comply with court orders, abused the discovery process, and, according to at least one General Motors engineer, systematically destroyed files the company knew would be relevant to litigation arising out of the defect. General Motors has done everything in its power to throw up roadblocks to the discovery of the truth of its misfeasance in the course of the development, production, and marketing of vehicles with these defects,

particularly the defective sidesaddle pickups. The injunction, however, is General Motors' most sweeping and therefore most dangerous effort to silence the debate over the safety of its product.[3]

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[3]General Motors' conduct in *Cameron, et al. v. General Motors Corp.*, Civil Action Nos. 6:93-1278-3, -1279-3, -1280-3 (D.S.C. Apr. 30, 1993), *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga. Oct. 30, 1991), *Bishop v. General Motors Corp.*, No. CIV-94-286-B (E.D. Okla. Aug. 1, 1995), and *Conkle v. General Motors Corp.*, Civil Action No. SC92CV730 (Muscogee Cty. Ct., Ga. 1992) serves as stark support for this proposition. In *Cameron,* General Motors ended up settling the lawsuit after having penalties imposed by the trial court judge, an appeal to the Fourth Circuit, a recusal of the original trial judge and a vacating of his orders, and a reinstatement of the bulk of those orders. General Motors' actions in *Moseley* were similarly obstreperous. Three times in 1991 and 1992 the Georgia court ordered General Motors to produce documents to the court for *in camera* review. General Motors never complied. In *Bishop,* after General Motors failed to produce its trial exhibits until days before trial, and even then failed to comply with the court's orders concerning the form and scope of those exhibits, the court took the extraordinary step of barring General Motors from using any trial exhibits. *See* Order at 9 in *Bishop; see also* Benjamin Weiser, *Judge Imposes a Rare Sanction on GM in Upcoming Pickup Truck Trial,* WASH. POST, Sept. 10, 1995, at A9. Further, in *Conkle,* a Type III door latch case, the General Motors' failure to respond to discovery resulted in a trial court order defaulting General Motors on the issue of liability in that wrongful death suit. The Georgia Court of Appeals later vacated that order in favor of a lesser, yet still effective, sanction against General Motors.

Finally, the late Theodore Kashmerick, a former General Motors engineer, testified that between 1981 and 1983, attorneys representing General Motors known as the "fire babies" purged his files of documents showing General Motors' knowledge of the fuel

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Although other General Motors employees have given damaging testimony in suits alleging a defect in these trucks, no testimony has proved so damning as that offered by Mr. Elwell. As an engineer with a substantial role in the development of the fuel system in the 1973-1987 trucks, Mr. Elwell has an in-depth knowledge of what General Motors knew about the defect, and when. Mr. Elwell has provided in testimony a detailed description of General Motors' aborted attempts to address the problem, as well as the company's attempts to cover up evidence suggesting the presence of a defect. For instance, Mr. Elwell has testified to the following:

- Even prior to the introduction of the sidesaddle gas tanks trucks to the market, several General Motors engineers, including Mr. Elwell, recommended different fuel tank configurations. These suggestions were ignored in the interest of marketing concerns. Deposition of Ronald E. Elwell at 53, 56-58 in *In the Matter of General Motors Pickup Truck Investigation — United States Department of Transportation,* (Nov. 29, 1994).

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[3](...continued)
tank defect. *See* Deposition of Theodore Kashmerick at 92-93 in *Elwell v. General Motors Corp.*, Case No. 91-115946-NZ (Wayne Cty. Cir. Ct., Mich., Nov. 5, 1991)("I even had the guys from [legal group] . . . come to my office, and they sat down, took my desk and my chairs and they sat down and went through all my file cabinets and took every damn thing they thought was a problem . . . . I didn't feel that I needed it and it was shredded, long gone."). It is revelations like Mr. Kashmerick's that have led at least two courts, one in *Cameron* and one in *Bishop,* seriously to consider refusing General Motors' claims of attorney/client privilege by operation of the crime/fraud doctrine. For further discussion, see § II, *infra.*

- General Motors crash-tested sidesaddle gas tank trucks modified to include steel shields protecting the tanks. Despite the apparent efficacy of these shields, General Motors opted not to use them for fear that it would create a perception that the tanks were unsafe. *Id.* at 72-74, 160.

- Blueprints detailing an alternative, safer fuel system design considered prior to introduction of the sidesaddle configuration have mysteriously disappeared and have not resurfaced. Deposition of Ronald E. Elwell at 138-140 in *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga., Aug. 13, 1991).

- General Motors presentations as early as 1972 recommended that "[t]he potential for fire, *i.e.*, fuel leaks, should not occur in collisions which produce occupant impact forces below the threshold level of fatality." Decision makers ignored this recommendation. Examination of Ronald E. Elwell at 34-42 in *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga., Jan. 15, 1993).

- General Motors withheld from Mr. Elwell, as well as from private litigants, certain crash tests General Motors had conducted demonstrating the extreme vulnerability of the fuel tanks in the 1973-1987 pickup trucks. Deposition of Ronald E. Elwell at 16-18 in *Moseley v. General Motors Corp.*, No. 90V-6276 (Fulton Cty. Ct., Ga., May 3, 1991). These twenty two tests conducted between 1981 and 1983 consisted of crashing a passenger car into the side of a General Motors Corporation pickup truck at a speed at which a vehicle occupant would in most cases survive the impact. According to Mr. Elwell, the fuel tanks on the test trucks "opened like melons." *Id.* at 17.

Further, early in his career at General Motors, Mr. Elwell worked as an engineer on door latches. His knowledge of the history of door latch development at General Motors, as well as his evaluation of the Type III door latch during his employment with General Motors, have provided key information about the state of General Motors' knowledge during the production of the Type III latch. *See, e.g.*, Examination of Ronald E. Elwell at 717-718 in *Hardy v. General Motors Corp.*, Case Nos. CV-93-56, -57 (Lowndes Cty. Ct., Ala., May 15, 1996)(testifying that he had informed General Motors representatives of his concerns for the safety of the latches, and that he had refused to testify in court to their safety).

Courts across the country have permitted Mr. Elwell to testify because they have not found the above matters to be entitled to attorney/client or work product protection. These matters do not derive from Mr. Elwell's involvement as part of General Motors' legal defense team, nor do they derive from another General Motors employee's involvement in legal defense. Indeed, a substantial portion of the matters to which Mr. Elwell has testified revolves around the recounting of events and conversations occurring *prior to* the introduction of the trucks to the market. These matters consist of communications and observations of General Motors engineers and designers acting in their capacity as engineers and designers.

For example, in 1972, Mr. Elwell along with two other engineers made a "Presentation on Fuel System Integrity" to General Motors' Vice President for Engineering that proposed "[a] recommended level of fuel system performance is given for front, side and rear impacts, and rollover, premised on the concept that *occupants involved in collisions which produce occupant impact forces below the threshold level of fatality should be free from the hazard of post-collision fuel fires.*" (Emphasis added.) This

recommendation goes to the very heart of the instant case, for it stands for the fundamental safety principle that if occupants survive the force or trauma of a crash, they should not die by fire. General Motors strongly contends that this document is privileged and opposes its introduction into not only judicial but also regulatory proceedings because it shows that General Motors engineers as early as 1972 proposed a level of crash fire safety that even today General Motors vehicles do not have.[4]

Without discovery and introduction into evidence of this document, Ronald Elwell is the crucial fact witness willing to testify if subpoenaed as to General Motors' engineering knowledge on crash fire safety in the early 1970s. Even in the *Moseley* litigation, only the first two pages of this document were allowed into evidence during Mr. Elwell's

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[4]In making an initial determination of a safety defect in 1973-87 General Motors C/K pickups, Secretary of Transportation Federico Peña relied on this document, as well as a February 15, 1972 memorandum analysis by James Steger on the development of General Motors' internal Design Directive No. 8-A, applicable to all of the company's cars and trucks, that there should be no fuel leakage in 30-mph front, side or rear impacts. U.S. Department of Transportation, "Engineering Analysis Report And Initial Decision That The Subject Vehicles Contain A Safety-Related Defect," 41 (Oct. 17, 1994). General Motors contended that both documents were privileged, *see* Letter dated March 17, 1993 from James A. Durkin, General Motors Legal Staff, to Secretary Federico Peña, but the National Highway Traffic Safety Administration ruled otherwise, finding that "they appear to be documents prepared by GM engineers at the request of other GM engineers." *See* Letter dated April 2, 1993 from Kathleen DeMeter, National Highway Traffic Safety Administration Assistant Chief Counsel, to James A. Durkin. All documents were entered in the public file of the National Highway Traffic Safety Administration's defect investigation of General Motors C/K pickup trucks, No. EA92-041, at 057577.

testimony, and that was over General Motors' objections that they were protected by attorney/client privilege. Without Elwell's testimony to authenticate and explain the engineering principles and history of the document, it is unlikely this document could have been utilized at trial.

Nonetheless, the decision below would shield this information from public scrutiny, and adversely affect the inquiry into the safety of the sidesaddle gas tank trucks and the Type III latches. This windfall to General Motors operates as a grave harm both to litigants and to courts. First, depriving claimants of the benefit of Mr. Elwell's first-hand knowledge of the defect would unduly and perhaps fatally hamper efforts to hold General Motors accountable for its wrongs. The injunction places victims at a disadvantage by denying access to materials which are admissible or which might lead to admissible evidence. Likewise, it hinders the courts' function as a finder of fact. A court cannot rest assured of the truth or accuracy of its findings when it is not privy to the most salient non-privileged information available.

Where, as here, there has been so much discovery abuse and concealment of safety hazards from the public on the part of General Motors, courts should broaden rather than restrict their inquiry into the facts of the conduct at issue. To give full effect to the Michigan court injunction — an injunction issued without notice to affected parties, much less a finding of fairness to the interests of those parties — would offend this principle.

II. THE MATTERS FOR WHICH RESPONDENT HAS SOUGHT PROTECTION UNDER THE INJUNCTION MAY NOT BE PRIVILEGED AT ALL

General Motors and its lawyers have been sanctioned numerous times for discovery abuses in litigation over the safety of its fuel systems and door latches. Indeed, General Motors has been sanctioned for discovery abuse in the instant case. Rather than let the case proceed to trial with a complete discovery record of all relevant documents, General Motors' strategy is to run the risk of its defense being struck. In at least two cases other than the instant case involving door latches or fuel systems, General Motors crossed the line and the trial judge struck the defense or all of General Motors' exhibits. *See* discussion of *Bishop* and *Conkle* litigations, supra, note 3.

General Motors' conduct both prior to and in the course of the lawsuits involving the sidesaddle gas tank trucks has spawned a substantial debate over its entitlement to raise attorney/client and work product claims in connection with the activities of its legal staff and representatives. Thus, aside from the clearly non-privileged matters discussed above, Mr. Elwell's knowledge meeting the formal requisites for attorney/client protection still may properly be subject to disclosure.

Although arguments for the application of the crime/fraud doctrine typically arise in criminal cases,[5] the

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[5]*See, e.g., United States v. Laurins,* 857 F.2d 529 (9th Cir. 1988)(tax fraud); *United States v. Townsley,* 843 F.2d 1070 (8th Cir. 1988)(suborning perjury); *In re Grand Jury Investigation* (continued...)

doctrine is also available to civil litigants. *See, e.g., In re A.H. Robins Co.,* 107 F.R.D. 2 (D. Kan. 1985)(pattern of misrepresentation in connection with Dalkon Shield intrauterine device).

The "crime/fraud" exception applies only in the very rarest of circumstances. A party may seek to use the doctrine to overcome an adversary's attorney/client privilege when a legal representative offers "advice in furtherance of a fraudulent or unlawful goal . . . ." *In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983,* 731 F.2d 1032, 1038 (2d Cir. 1984). In balancing the competing values of facilitating sound legal advice and that of preventing crimes and frauds, the former must yield to the latter. For this reason, a "client's communications seeking . . . advice [in furtherance of a crime or fraud] are not worthy of protection." *Id.*

The party invoking the crime/fraud exception must make a prima facie showing that the party against whom the exception would operate (1) engaged in a crime, fraud, or otherwise unlawful act, and (2) that party sought legal advice in perpetuation of the offensive act or practice. *United States v. Zolin,* 905 F.2d 1344, 1345 (9th Cir. 1990). *See also In re Richard Roe Inc.,* 68 F.3d 38, 40 (2d Cir. 1995)(movant must demonstrate "probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof."). More specifically, the moving party must make a threshold showing based on non-privileged evidence "sufficient to

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[5](...continued)
(Appeal of Schroeder), 842 F.2d 1223 (11th Cir. 1987)(tax fraud); *United States v. Ballard,* 779 F.2d 287 (5th cir. 1986)(bankruptcy fraud); *United States v. Dyer,* 722 F.2d 174 (5th Cir. 1983)(extortion under color of official right).

support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability." *United States v. Zolin*, 491 U.S. 554, 574-575 (1989).

Even under these stringent criteria, the evidence adduced in the sidesaddle truck suits, including the information provided by Mr. Elwell, makes out the prima facie case. As mentioned in note 3, *supra*, at least two courts have seen fit to consider the propriety of a party's invocation of the crime/fraud doctrine against General Motors. The courts in both the *Cameron* litigation in South Carolina and the *Bishop* litigation in Oklahoma entertained motions to apply the crime/fraud exception against General Motors, ultimately finding sufficient basis to merit an *in camera* review of documents relevant to the communications in furtherance of the unlawful conduct. Although neither case resulted in a final finding of crime/fraud, the fact that claimants have met the threshold requirements for this extraordinary measure strongly counsels in favor of further examination.

It is paradoxical, therefore, that the Michigan court's injunction would protect such communications by stopping the inquiry before it starts. The injunction appears to accept without substantial investigation that Mr. Elwell is privy to attorney/client and work product information, and that this information is inextricable from other matters Mr. Elwell came to know through his employment at General Motors. By operation of the injunction, General Motors bears no burden of claiming attorney/client or work product protection. Rather, the injunction creates an effective presumption that anything Mr. Elwell might know is privileged. Such a ruling is improvident and, as Petitioners argue, unconstitutional.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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(10)

No. 96-653

In the Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH LEE BAKER AND STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS, PETITIONERS

v.

GENERAL MOTORS CORPORATION, RESPONDENT

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Full Faith and Credit Clause of the United States Constitution (Art. IV, § 1) and 28 U.S.C. § 1738 required a federal district court in Missouri to respect an injunction entered by a state court in Michigan that prohibited a former employee of General Motors Corporation from testifying against the company.

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INTEREST OF THE AMICUS CURIAE

The Product Liability Advisory Council, Inc. ("PLAC") is a non-profit corporation with 124 corporate members from a broad cross-section of American industry. (A list of PLAC's members is attached as an Appendix.) PLAC's purpose is to submit *amicus curiae* briefs on significant issues that affect the law of product liability.[1] PLAC has submitted many *amicus* briefs in state and federal courts, including this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners' brief is a remarkable example of advocacy by misdirection. It argues that full faith and credit is not warranted in a variety of situations that bear little or no resemblance to the case at hand: that full faith and credit is inappropriate if it means precluding suits by third parties, if it mandates enforcing antisuit injunctions, if it prevents whistleblowers from revealing concealed information, or if a state court purports to enjoin parties from seeking relief in federal court. But the Court need not address any of these issues to resolve the question actually presented, which is whether a federal district court in Missouri may ignore the constitutional and statutory obligation to give full faith and credit to the judgment of a Michigan state court because it may have incidental, and legally harmless, effects on a third party.

To put this case in its proper context, two facts need to be emphasized at the outset: First, the case arises in the posture it does only because Ronald Elwell, having accepted an undisclosed sum of money to settle a lawsuit with respondent General Motors Corporation ("GM") by entering into a consent decree, chose to disregard the court's order and violate the injunction. Had Elwell complied with the consent decree, any full faith and credit issues would have been greatly simplified: the only courts with power to order Elwell's testimony would

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[1] Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of this Court. See S. Ct. R. 37.3. This brief has been written entirely by counsel for PLAC and has been paid for entirely by PLAC. See Rule 37.6.

have been in Michigan, the state that issued the judgment and where Elwell lived at the time of the settlement, and New Mexico, where it appears that he currently resides. Instead, as petitioners' reference to 33 other courts in which Elwell has testified makes clear, Elwell scorned the court's decree and embarked on a second career as a paid consultant who makes his living testifying against GM.

Second, petitioners want Elwell to testify only in his capacity as an expert. See Pet. App. 22a ("The parties agree that Elwell is an expert on G.M. fuel systems, including the design history, fuel system safety, design decision-making and subsequent alternative designs. These are the areas into which plaintiffs wish to inquire.").[2] Indeed, Elwell could not go beyond his general expertise about GM products without getting into forbidden areas where his knowledge is based on privileged information — which even petitioners concede is beyond the scope of their entitlement. *Ibid.* No claim is or could be made that Elwell's testimony is either crucial to petitioners' case or irreplaceable. Petitioners may believe that Elwell's unrelenting ill-will toward GM makes him an especially desirable witness, but there are other, equally qualified witnesses who could offer the same information to a jury. The question is thus whether petitioners' desire to have the particular expert of their choice is so important as to overcome the values embodied in the Full Faith and Credit Clause.

The answer is plainly no: As the final judgment of a court with jurisdiction over the parties and the subject matter, the

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[2] Petitioners apparently listed Elwell as a "fact witness" in their request for an order to depose him (Pet. App. 22a), but nothing turns on this label. The substance of Elwell's testimony, as described by the district court, is clearly that of an expert called because his "technical * * * knowledge will assist the trier of fact." Fed. R. Evid. 702. Indeed, petitioners told the district court that they were not seeking information that is "specific" or that Elwell obtained as a member of GM's in-house litigation team. They were, rather, calling Elwell to testify because of his "expert[ise]" on the *general* history, development, and safety of GM fuel systems. *Ibid.*

Michigan decree is entitled to the same respect and recognition as any other judgment. That the decree orders injunctive relief in no way affects this conclusion. And petitioners' claim that excluding Elwell's testimony violates their due process rights by binding them to a judgment rendered in proceedings to which they were not parties is spurious. The judgment binds only GM and Elwell. Enforcing the judgment against Elwell may have an incidental effect on petitioners, but judgments often affect the litigation strategies or legal interests of third parties. Here, petitioners are being deprived merely of the use of a single, nonessential witness whose testimony can be replaced, something the rules of evidence routinely do for a variety of reasons less weighty than the constitutional obligation to give full faith and credit to the judgment of a sister state. Finally, petitioners have not offered any justification for creating an exception to the Full Faith and Credit Clause — something this Court has rarely done and then only for the most compelling reasons.

ARGUMENT

I. THE FULL FAITH AND CREDIT CLAUSE REQUIRED THE TRIAL COURT TO EXCLUDE ELWELL'S TESTIMONY

On its face, the Michigan decree bears all the earmarks of a judgment entitled to full faith and credit: it is the final judgment of a court with jurisdiction over the parties and the subject matter, and no one maintains that it was obtained under duress or by fraud. See *Riehle v. Margolies*, 279 U.S. 218, 225 (1929); Lea Brilmayer *et al.*, AN INTRODUCTION TO JURISDICTION IN THE AMERICAN FEDERAL SYSTEM 177-85 (1986). That the judgment was entered by consent in no way affects the analysis, because the decree embodied a lawful agreement under Michigan law and settled a genuine dispute before the Michigan court. See *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996) (federal court required to give full faith and credit to a state court consent decree).

A. The Full Faith And Credit Clause Applies To Injunctions

Petitioners half-heartedly suggest that injunctions may fall outside the scope of the Full Faith and Credit Clause. Pet. Br. 25. They do not press the point, for reasons that are apparent from the analysis below. Nevertheless, because the authorities they cite, if read out of context, could confuse this important issue, we address it here.

1. There is, to begin with, no basis in the language of either the Full Faith and Credit Clause or its implementing statute, 28 U.S.C. § 1738, to justify treating injunctions differently from other judgments. Both provisions command that full faith and credit must be accorded to "judicial proceedings," with no limitations, and so both must be read to require giving equity decrees the same measure of respect as judgments for the payment of money. See *Barber v. Barber*, 323 U.S. 77, 87 (1944) (Jackson, J., concurring); RESTATEMENT (SECOND) OF CONFLICT OF LAWS ("RESTATEMENT (SECOND)") § 102, comment *c* (1971). The decision to use this inclusive language could hardly have been inadvertent. The drafters of the Constitution and of Section 1738 were acutely conscious of the distinction between law and equity, much more so than lawyers today (given the merger of law and equity), and they were careful to distinguish between them where appropriate. See, *e.g.*, U.S. Const., Amend. VII; Process Act of 1792, § 2, 1 Stat. 275, 276 (authorizing federal courts to promulgate rules for equity and admiralty cases "according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contra-distinguished from courts of common law"). The failure to draw any distinction in connection with the Full Faith and Credit Clause thus suggests that the Clause means exactly what it says: recognition is owed to the "judicial proceedings" of other states without regard for the nature of the remedy.

The conclusion that injunctions are entitled to the same respect as other judgments also makes sense, inasmuch as the policies behind full faith and credit apply with equal force and in precisely the same manner whether a decree orders equitable relief or money damages. Prior to judgment, as this Court has explained, "since each of the states of the Union has constitutional authority to make its own law with respect to persons and events within its borders, the full faith and credit clause does not ordinarily require it to substitute for its own law the conflicting law of another state." *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 436 (1943). So long as a state has contacts sufficient to give it a legitimate interest in the disposition of the suit, its courts may apply their own law. See, *e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Assoc. v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

Once a court has taken the further step of actually adjudicating a case, however, this freedom of choice disappears: The state whose court has devoted its resources to resolving the dispute and placed its prestige and dignity behind a judgment acquires an interest in the finality of the decree — an interest that must be respected by courts in other states as a matter of federal constitutional law. *Magnolia Petroleum Co.*, 320 U.S. at 436-39; *Williams v. North Carolina*, 317 U.S. 287, 293-96 (1942); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 293 (1980) (Rehnquist, J., dissenting). Every court in the United States must give the judgment the same effect and recognition as it would receive from the court that rendered it. 28 U.S.C. § 1738. In this way, the Full Faith and Credit Clause protects the legitimate interests of parties and courts in seeing that "there be an end of litigation." *Baldwin v. Iowa State Traveling Men's Assoc.*, 283 U.S. 522, 525 (1931). More important, the Clause avoids problems that would arise if courts in different states were to issue conflicting decrees, and so helps

"weld the independent states into a nation." *Johnson v. Muelberger*, 340 U.S. 581, 584 (1951). As Justice Stone explained for the Court in *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935):

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

Id. at 276-77. See also Eugene F. Scoles & Peter Hay, CONFLICT OF LAWS § 24.2 (2d ed. 1992).

These vital interests are present in the same manner and to the same degree whether the final judgment of a court takes the form of an award of damages, a declaration of rights, or an injunction. The court that rendered the judgment has invested its time and resources to resolve a dispute and has placed its institutional reputation behind a final decree. To allow courts in other states to give this judgment less than full respect simply because it is in the form of an injunction invites precisely the mischief that the Full Faith and Credit Clause was designed to prevent — and for no discernible reason.

Indeed, the threat to judicial comity is, if anything, enhanced when an injunction is involved. Courts provide this remedy only after making special findings that extraordinary relief is required, and injunctions typically implicate the interests and resources of the rendering court to a greater degree than an ordinary judgment for damages. See Dan B. Dobbs, THE LAW OF REMEDIES §§ 2.4, 2.5, 2.9 (2d ed. 1993). Hence, as one leading commentator has observed, reflecting the views of virtually everyone in the field, the notion that an equity decree should be entitled to less than full faith and credit is "indefensible." Albert Ehrenzweig, CONFLICT OF LAWS 182

(rev. ed. 1962); *see also* Scoles & Hay, *supra*, at 964; Roger C. Cramton, David B. Currie, Herma Hill Kay & Larry Kramer, CONFLICT OF LAWS 453-54 (5th ed. 1993). For this reason, and apart from the narrow exceptions discussed below, lower courts have invariably given recognition without regard for whether a judgment is in law or in equity. See, *e.g.*, *In re Marie Callender Pie Shops, Inc.*, 592 P.2d 1050 (Or. App. 1979); *Spence v. Durham*, 198 S.E.2d 537 (N.C. 1973), *cert. denied*, 415 U.S. 918 (1974); *Rich v. Con-Stan Indus., Inc.*, 449 S.W.2d 323 (Tex. Ct. Civ. App. 1969); *LaVerne v. Jackman*, 228 N.E.2d 249 (Ill. App. 1967).

2. Petitioners offer no explanation, much less a justification, for their suggestion that injunctions ought not to receive full faith and credit, a conclusion that would in a stroke render the Full Faith and Credit Clause inapplicable to a substantial portion of modern litigation. They merely assert that injunctions have no extraterritorial effect under the Full Faith and Credit Clause, citing § 102 of the RESTATEMENT (SECOND) and this Court's decision in *Lynde v. Lynde*, 181 U.S. 183 (1901). Pet. Br. 25-26.[3] But their brief is carefully written to conceal a crucial distinction, drawn by both authorities, between questions of *recognition* and questions of *enforcement*. As explained in the RESTATEMENT's "introductory note":

> A foreign judgment may be entitled to two forms of respect, namely, recognition and enforcement. * * * [A] judgment is recognized to the extent that it is given the same effect with respect to the parties, the subject matter of the action and the issues involved that it has in the state where it was rendered. Some judgments,

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[3] Petitioners add a "see also" citation to *Slater v. Mexican Nat'l R.R. Co.*, 194 U.S. 120 (1904), and *Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354 (1914). But these are *choice of law* cases and have nothing to do with full faith and credit to *judgments*, which raises entirely different considerations. *Magnolia Petroleum Co.*, 320 U.S. at 436-39; *Thomas v. Washington Gas Light Co.*, 448 U.S. at 293 (Rehnquist, J., dissenting).

> such as those for the payment of money, entitle the plaintiff to affirmative relief. When this relief is granted, the judgment is said to be enforced.

RESTATEMENT (SECOND), at 302.

According to petitioners' own source — § 102 of the RESTATEMENT (SECOND) — there is no question that a judgment "that orders the doing of an act other than the payment of money or that enjoins the doing of an act will be given the same degree of recognition as any other judgment," an obligation "required by full faith and credit." *Id.* § 102, comment *b*. The RESTATEMENT then goes on to observe, as petitioners indicate, that this Court has not yet ruled on whether the Full Faith and Credit Clause requires a state to *enforce* another state's judgment ordering or enjoining the doing of an act. But while the RESTATEMENT takes no definitive position on the question, its commentary plainly favors extending the obligation.[4] More

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[4] See RESTATEMENT (SECOND), § 102, comment *c* at 307-08:

> It may well be that the Supreme Court, when presented with the question, will hold that the enforcement of such decrees is required by full faith and credit. In support of such a position, reliance may be placed upon the language of the full faith and credit clause * * * and its implementing statute .* * * Since the clause and its implementing statute refer to "judicial proceedings" without limitation, it can be argued that they must be read as applying to equity decrees of all types and as requiring that such decrees be given the same measure of respect as judgments for the payment of money. In further support of such a position, reliance can also be placed on the fact that a majority of State courts have enforced sister State judgments ordering the conveyance of land.

"In opposition to these arguments," the RESTATEMENT (SECOND) offers only an assertion from the 1934 RESTATEMENT that because issuing an injunction is a matter of discretion, a decision by one court will not "exclude the use of discretion by the second court." *Ibid.* As explained below, we agree with this statement insofar as it means that a second court has the *same* discretion as the court that rendered the judgment. It is, however, senseless to say that, because the rendering court has some discretion, a second court has more, and it is a *non sequitur* to make the fact of discretion grounds to

important, the case law overwhelmingly favors this result, particularly cases decided since the RESTATEMENT (SECOND) was adopted in 1971. See cases cited in the Reporter's Note to § 102 and in the subsequent appendices to the RESTATEMENT (SECOND).

That there should even be a distinction between recognition and enforcement may seem odd. This becomes less perplexing if we understand the background properly, just as it becomes apparent why the doctrine is irrelevant in this case. The distinction between recognition and enforcement has its origin in certain historical peculiarities of full faith and credit law. Rather than make the judgment of one state immediately enforceable in another, the practice has always been for a party seeking the benefit of a judgment to bring suit on that judgment in the second state. The Full Faith and Credit Clause then requires the second state to recognize the judgment in terms defined by the preclusion law of the state that rendered it, with the result that the second state issues its own judgment to the same effect as the first one. See Robert A. Leflar, Luther L. McDougal & Robert L. Felix, AMERICAN CONFLICTS LAW § 78 (4th ed. 1986). The details for enforcing this new judgment are then treated as a matter of procedure, governed by forum law. Hence, the statement in *Lynde* — quoted grossly out of context by petitioners (Pet. Br. 26) — that the provisions of a foreign judgment providing for its enforcement "being in the nature of execution, and not of judgment, could have no extraterritorial operation" and that enforcement in the second state depends only on its own "local statutes and practice." 181 U.S. at 187.

As with other problems at the border of substance and procedure, determining when the forum may apply its own law and when full faith and credit requires the forum to yield is not

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ignore the judgment altogether.

always easy.[5] But wherever the precise boundary lies — something the Court need not address to decide this case — it is fatuous to say that, because the forum may sometimes apply its own law as to the mode and form of enforcement, it may simply refuse to enforce the judgment of a sister state altogether. On the contrary, the Full Faith and Credit Clause forbids the forum to discriminate against the law or judgment of a sister state that calls for a kind of enforcement that the forum provides in domestic cases. *Broderick v. Rosner*, 294 U.S. 629 (1935) (court may not use local rules of procedure to discriminate against foreign claims or judgments). Thus, as the Court explained in *Sistare v. Sistare*, 218 U.S. 1 (1910):

> [A]s pointed out in *Lynde v. Lynde*, although mere modes of execution provided by the laws of a State in which a judgment is rendered are not, by operation of the full faith and credit clause, obligatory upon the courts of another State in which the judgment is sought to be enforced, nevertheless if the judgment be an enforceable judgment in the State where rendered the duty to give effect to it in another State clearly results from the full faith and credit clause, although the modes of procedure to enforce the collection may not be the same in both States.

Id. at 26.[6]

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[5] This Court has held, for example, that a state is not bound to establish judicial machinery for foreign suits that it does not provide for its own causes of action, *Anglo-American Provision Co. v. Davis Provision Co.*, 191 U.S. 373 (1903), and that it may apply its own non-discriminatory statute of limitations, *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312 (1839).

[6] Problems that formerly arose due to discrepancies in the details of enforcement law in different states are eased today by the adoption in 33 states of the Uniform Enforcement of Foreign Judgments Act, 13 U.L.A. 149, 181 (1986).

There can be no question that the district court is capable of enforcing Michigan's judgment in this case. The judgment calls for a type of action — excluding testimony by a witness — that is easily and regularly taken. Indeed, given the nature of the relief requested, it does not matter whether the court applies Michigan, Missouri, or federal enforcement law. The only thing that the district court may *not* do is refuse to enforce the judgment altogether. For that would be to treat the Michigan decree differently than a similar decree from a Missouri court, and in doing so to thwart the Michigan judgment in direct contravention of the Full Faith and Credit Clause.[7]

3. There is a second context in which the equitable nature of a judgment may affect the obligation of full faith and credit. Petitioners do not refer to it, perhaps because it does not help their case. We nevertheless mention it briefly to avoid any risk of confusion.

Recognition in the interstate setting is generally thought to be required only for *final* decrees and judgments. RESTATEMENT (SECOND), § 107; Scoles & Hay, *supra*, at 963. Some decrees may lack sufficient indicia of finality to invoke the obligation of full faith and credit even if they are treated as judgments by the rendering state. In *Sistare v. Sistare*, 218 U.S. 1 (1910), for example, a plaintiff who was awarded alimony in a divorce action won a second judgment in New York for payments that her former husband had failed to make under the divorce decree. She sued on this second judgment in Connecticut. Relying on *Lynde v. Lynde*, *supra*, the Connecticut court refused to recognize or enforce the New York judgment. This Court reversed, holding that a judgment for payments past due under a divorce decree is entitled to full faith and credit. *Lynde* was distinguished on the ground that it

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[7] The case might be different if enforcement of the Michigan decree required "continuing supervision by the enforcing court or [was] otherwise onerous." RESTATEMENT (SECOND), § 102, comment *c*. But that is simply another question not presented by this case.

concerned *future* alimony: Its ruling that full faith and credit did not apply, the Court said, "was expressly based upon the latitude of discretion which the courts of New Jersey were assumed to possess over a decree for the payment of future alimony." *Sistare*, 218 U.S. at 16. According to the Court, the "general rule" of full faith and credit may not apply where a judgment "is discretionary with the court which rendered the decree, to such an extent that no absolute or vested right attaches * * * ." *Id.* at 17.

Cases like *Lynde* and *Sistare* are sometimes erroneously read to stand for the proposition that a modifiable judgment is not entitled to full faith and credit. See, *e.g.*, RESTATEMENT (SECOND), § 109. Such a reading is much too broad, however, for *all* judgments may be modified in appropriate circumstances. See Fed. R. Civ. Proc. 60(b). The doctrine is, rather, confined to certain judgments in the field of domestic relations — alimony, child support, child custody, and the like — that are issued with the affirmative expectation that they will be modified, and so are unlike the usual final decree of a court. See *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 612-13 (1947) (noting that the power to revise a child custody decree is not restricted to changed circumstances but is always governed by the best interests of the child); Cramton, Currie, Kay & Kramer, *supra*, at 455.[8]

Whether these alimony, support, and custody cases are still good law is uncertain. Justice Jackson objected fiercely to denying full faith and credit to the judgment of a sister state on the ground that it was not final enough, *Barber v. Barber*, 323 U.S. at 86-88 (Jackson, J., concurring), and the Court

[8] Accordingly, it is not surprising that every case cited on this point by the RESTATEMENT (SECOND), § 109, both in the original text and in the supplements, involves domestic relations.

deliberately left the issue open in both *Barber* and *Halvey*.[9] The answer may be, as Justice Frankfurter argued, that family law is different — that it involves considerations so unlike other controversies as to render "technical questions" of finality "irrelevant." *Halvey*, 330 U.S. at 616 (Frankfurter, J., dissenting). But whether or not the principle in these domestic relations cases is still valid, it plainly does not extend to ordinary judgments for a final injunction. Unlike the designedly provisional decrees issued in the context of alimony or child support, permanent injunctions are intended to be final and so invoke the interests protected by the Full Faith and Credit Clause. Consent decrees and injunctions can be modified, of course, just like any other judgment. But modification is appropriate only in limited circumstances and only if the court that issued the injunction finds that the facts warrant a change. See, *e.g.*, *First Protestant Reformed Church v. De Wolf*, 100 N.W.2d 254, 357 (Mich. 1960). That the rendering court has reserved the option to modify an injunction if subsequent developments render it oppressive or self-defeating in no way alters the essential fact that the decree is meant to be a final disposition on the merits to which the obligation imposed by the Full Faith and Credit Clause must attach.

4. The fact that an injunction can be modified is not without consequences for full faith and credit analysis. Both the Constitution and 28 U.S.C. § 1738 have been interpreted to require only that a judgment receive the *same* respect and recognition as it would receive in the state that rendered it. This

[9] Uncertainty created by the Court's decisions in these cases and in *May v. Anderson*, 345 U.S. 528 (1953) (full faith and credit not required for custody decree rendered by court lacking personal jurisdiction over mother), was an important factor leading to the enactment of the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, which requires recognition of child custody determinations under specified conditions. The adoption of this statute, together with a more recent statute dealing with child support (*see* 28 U.S.C. § 1738B), has to a large extent eliminated the problem of non-recognition in this context.

Court stated the rule in *Halvey v. Halvey*, 330 U.S. at 615: The forum must recognize and enforce another state's judgment to the same extent as a court in the rendering state, which means that it also "has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered."

The district court in Missouri is thus free, if it chooses, to disregard or modify the Michigan injunction to the same extent — but *only* to the same extent — as a Michigan court. Under Michigan law, a court presented with a request for modification must order the parties to seek relief from the court that entered the decree. See Mich. Civ. R. 2.613(B). Under the Full Faith and Credit Clause, then, a Missouri court must do the same thing.[10]

B. The Full Faith And Credit Clause Does Not Become Inapplicable Because Enforcing A Judgment Has Incidental Effects On Third Parties

Petitioners' principal argument (Pet. Br. 12-18) is that the Michigan judgment cannot be enforced against Elwell, because to deprive them of Elwell's testimony violates due process by binding them to a judgment rendered in proceedings in which they neither participated nor were parties.

1. The argument is specious. No one has ever suggested that the Michigan judgment binds petitioners. The judgment binds only the parties to it: GM and Elwell. GM is simply asking a federal district court in Missouri to do what a Michigan court would assuredly do and enforce the judgment against Elwell. The need to enforce arises in the context of petitioners' lawsuit because it is in this lawsuit that Elwell is planning to disobey the Michigan judgment. The only party bound,

[10] As the court of appeals observed (Pet. App. 15a), Elwell and others have tried to have the Michigan injunction modified or vacated on "several occasions," the most recent only last year. Petitioners have refused to do so.

however, and the only party against whom the judgment is to be enforced, is Elwell.

Enforcing the judgment against Elwell obviously has an *effect* on petitioners: a witness whose testimony they had hoped to use would become unavailable. But if that is enough for petitioners to say that they are unconstitutionally "bound," the legal system is in trouble, for judgments affect third parties in this way all the time, often in circumstances that are considerably more meaningful than this.[11] To take a common example, suppose A sues B for possession of certain property, and the court awards the property to A. If C has a claim against B (but not A) for the same property, the judgment obviously affects C's rights: C has lost its legal right to sue for possession and must settle instead for damages, which may not be as satisfactory. Yet no one would seriously contend that C has been "bound" by A's judgment against B. Or suppose that A obtains a divorce from B. The divorce affects the legal rights (as well as other interests) of their child C in a variety of ways that are only partly redressed by child support and visitation. Yet C's due process rights are not violated as a result of these consequences. Or suppose that A obtains a judgment requiring B to close his adult bookstore on nuisance grounds. C's right to purchase from B is obviously affected, but no one would say that C has therefore been bound by the judgment.

The point seems obvious: Judgments may affect third parties in a variety of ways that limit legal interests they would otherwise possess. *Martin v. Wilks*, 490 U.S. 755, 770-73 (1989) (Stevens, J., dissenting); *cf.* Fleming James, Geoffrey C.

[11] It is worth noting that the Full Faith and Credit Clause is incidental to petitioners' claim that enforcing the judgment against Elwell violates their due process rights, because those rights would be equally "violated" by the decision of a *Michigan* court to preclude Elwell from testifying at the behest of a third party in Michigan. The potential implications of a ruling in petitioners' favor are thus very broad and would raise a difficult due process issue in every instance where a judgment affects third parties.

Hazard & John Leubsdorf, CIVIL PROCEDURE 688 (4th ed. 1992) (judgment may affect legal interests of nonparty, who can petition for equitable relief only on grounds that court lacked subject-matter jurisdiction or judgment was a product of fraud directed at petitioner). Indeed, Rules 19 and 24 of the Federal Rules of Civil Procedure were amended in 1966 to protect persons whose interests might "as a practical matter" be affected by a judgment in a case to which they were not parties. Often these rules lead to the inclusion of such parties in the litigation. But if they are not joined or do not intervene — whether because they sat on their rights or because they never knew those rights were in jeopardy — they still must live with the consequences.

None of the illustrations above differs in any material sense from petitioners' case. Their "right" to Elwell's services is no different from the rights of the claimants in the examples to sue for possession of property, to receive the full services of a parent, or to buy a product from someone willing to sell it. Without the Michigan judgment, petitioners might have been able to use Elwell as a witness.[12] With it, he is no longer

[12] Even this much is not entirely clear. Despite the label "fact witness," it appears that Elwell is to testify as an expert: certainly he is being paid as an expert, and his testimony was described in such terms by the district court. See Pet. App. 22a. That being so, petitioners could not have compelled Elwell's assistance had he turned down their invitation to consult; they simply would have had to find another expert to testify about GM fuel systems. Nor would it have mattered why Elwell declined petitioners' offer. Had he refused because, as a loyal former GM employee, he did not want to hurt the company, petitioners would have had no recourse: no court will order an unwilling expert to work when other qualified witnesses are available. Enforcing the Michigan judgment thus leaves petitioners no worse off than they would have been had Elwell honored the agreement with GM, as he should have done. Indeed, it leaves them no worse off than any party who is unable to hire the expert witness it most desires. It is perverse to twist the fact that, by virtue of the consent decree, Elwell can be made to abide by his agreement into the conclusion that petitioners are therefore being "bound" by the judgment in violation of due process.

available. But this no more violates due process than do the similar effects in the hypotheticals.

Any conceivable doubt in this regard is removed by this Court's decision in *Morris v. Jones*, 329 U.S. 545 (1947). Morris sued Chicago Lloyds (an unincorporated association licensed to sell insurance in Illinois, Missouri, and other states) in Missouri for malicious prosecution and false arrest. While this action was pending, Chicago Lloyds filed for bankruptcy in Illinois. Jones's predecessor was appointed "statutory liquidator," and the Illinois court issued an order staying all suits against the company. Morris had notice of this order but nevertheless continued to prosecute his claim in Missouri. Counsel for Chicago Lloyds withdrew, explaining that the company's assets were controlled by the liquidator (who was not made a party). The Missouri court then issued a default judgment in favor of Morris, who made it the basis for his claim in the Illinois bankruptcy proceedings.

The Illinois bankruptcy court disallowed Morris's claim, but this Court reversed. The Court held that, because the Missouri decision was a final judgment entitled to full faith and credit, its determination of the validity and amount of Morris's claim was "final and conclusive" and could not "be challenged or retried in the Illinois proceedings." 329 U.S. at 551-52. Like petitioners here, Justice Frankfurter protested in dissent that this was unfair to other creditors, none of whom were parties in the Missouri action and all of whom were being deprived of their right to challenge Morris's claim to a portion of the assets. *Id.* at 559-65 (Frankfurter, J., dissenting). Nevertheless, the Court replied, "[t]he command is to give full faith and credit to every judgment of a sister State." *Id.* at 553. See also *Riehle v. Margolies*, 279 U.S. 218 (1929).[13] Petitioners are in a position

[13] In a similar vein, the Court has held that the judgment of a federal court may conclusively establish a party's claim to a share of a decedent's estate in state probate proceedings. See, *e.g.*, *Waterman v. Canal-Louisiana Bank and Trust Co.*, 215 U.S. 33 (1909); *Byers v. McAuley*, 149 U.S. 608 (1893);

analogous to that of the other creditors in *Morris*, except that the effect of the Michigan judgment on their interests is far less harsh. And like those creditors, petitioners have no ground to complain simply because the constitutional obligation to recognize Michigan's judgment has this incidental effect on their litigation strategy.[14]

2. As against this, petitioners are able to offer no authority establishing that such effects constitute a violation of the Due Process Clause. They insist that enforcing the Michigan judgment against Elwell deprives them of their "right to pursue a lawful claim of liability." Pet. Br. 16. But no issues of fact or law are being foreclosed, nor are any obstacles being placed in the way of petitioners' right to recover. They are merely being deprived of the use of a single, nonessential witness whose testimony can be replaced. Such "deprivations" happen all the time in litigation, and for a whole host of reasons.

This last observation also provides a complete answer to petitioners' related contention that enforcing the Michigan judgment deprives them of the right to "elicit[] relevant, nonprivileged evidence." Pet. Br. 16. Unlike their point about being deprived of the right to pursue a claim, at least this assertion is based partly in reality: enforcing the Michigan judgment will indeed limit the evidence available to petitioners. But as the rules of discovery and evidence make abundantly clear, this "right" is restricted for a multitude of extrinsic policy

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Hess v. Reynolds, 113 U.S. 73 (1885); *Yonley v. Lavender*, 88 U.S. (21 Wall.) 276 (1874).

[14] The Court in *Morris* observed in dictum that "[i]f this were a situation where Missouri's policy would result in the dismemberment of the Illinois estate so that Illinois creditors would go begging, Illinois would have such a large interest at stake as to prevent it." 329 U.S. at 554. Similarly, as we explain below, this case might be different were Elwell's testimony irreplaceable and so central to petitioners' claim that without it they could not hope to make a case at all. But since that manifestly is not the situation, there is no need to address this possibility.

considerations, many of them less weighty than the constitutional obligation to recognize and enforce a sister state's judgment. See, *e.g.*, Fed. R. Evid. 403 (cumulative evidence excluded to save time); Fed. R. Evid. 407 (evidence of subsequent remedial measures excluded to encourage improvements); Fed. R. Evid. 408 (evidence of settlement discussions excluded to encourage settlement); Fed. R. Evid. 409 (payment of medical expenses excluded to facilitate treatment); Fed. R. Evid. 410 (evidence of plea discussions excluded to encourage guilty pleas); Fed. R. Evid. 412 (evidence of prior sexual conduct of victim excluded to protect privacy and encourage victims to seek legal redress). To the extent, then, that compliance with the Full Faith and Credit Clause has the incidental effect of imposing this modest restriction on petitioners' free use of evidence, they have no ground to complain.

Certainly *Ex Parte Uppercu*, 239 U.S. 435 (1915), offers no support for petitioners' position. In that case, after the parties to a lawsuit settled their claim, the federal district court before whom it was heard agreed to enter an order sealing the evidence. Uppercu wanted a deposition from the case, which he believed might be useful in an action he was pursuing against someone else. The district court denied Uppercu's request because one of the parties to the former action objected, and Uppercu sought relief by way of mandamus.

This Court granted the petition, holding, as petitioners here indicate, that Uppercu should have access to the evidence. But the Court's decision rested on grounds that have no bearing on the issues presented here. The order sealing the evidence was not a final judgment or even part of the judgment in the case; it was an administrative order entered by the court for the convenience and benefit of the parties. No one argued that Uppercu was or could be bound by it, and, of course, there was no issue of full faith and credit because the proceedings all took place in the same court. This Court did not mention due process or even the Constitution in ruling for Uppercu. Rather, the

Court held that, "however proper and effective the sealing may have been as against the public at large," a federal court should not deny access to evidence to someone who needs it for trial unless there is a good reason. 239 U.S. at 440 ("So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown to the general rule. We discover none here.") The Court's decision establishes a rule of procedure for federal judges to follow where evidence is sealed, presumably based on the Supreme Court's supervisory power over federal courts. The ruling is not based on the Constitution, and there is not even a hint that the opposite result would have violated Uppercu's due process rights. Indeed, courts routinely seal evidence in ways that deny access to other parties seeking it for litigation; under *Uppercu*, they simply need a reasonable justification to do so.[15] The ruling is thus fundamentally different from a case in which the constitutional obligation to give a final judgment full faith and credit has the incidental effect of limiting a party's ability to call a particular witness.

The only authority cited by petitioners that even remotely supports their position is *Martin v. Wilks*, 490 U.S. 755 (1989). In that case, African-American plaintiffs sued the City of Birmingham in federal court for race discrimination in hiring and promoting firefighters. The parties negotiated two consent decrees setting forth a remedial plan calling for extensive affirmative action. After approval of the decrees, a group of white firefighters ("the Wilks respondents") filed a separate action alleging that the decrees violated their rights under federal law. The district court ruled that the City could not be held liable for race discrimination for making promotion

[15] The Court emphasized that Uppercu was entitled to this evidence because the only reason offered to deny him access was "the mere unwillingness of an unprivileged person to have the evidence used." 239 U.S. at 440. In this case, by contrast, there is a very powerful reason: the constitutional obligation to recognize and respect the final judgment of a sister state.

decisions required by the consent decree. The court of appeals reversed, and this Court affirmed that decision.

At first blush, there seem to be parallels between *Martin* and this case. The City argued that the challenge to the consent decrees constituted an improper collateral attack, to which the Wilks respondents replied that the consent decrees could not bind them because they had not been parties to the action in which the decrees were entered. Justice Stevens, in dissent, reasoned that the Wilks respondents were not bound, but that the consent decrees could have a practical effect on their job opportunities. 490 U.S. at 769. One might be tempted to conclude that *Wilks* thus supports a claim that petitioners' due process rights could be violated if enforcing the Michigan judgment has the practical effect of curtailing their use of Elwell as a witness.

One problem with this conclusion is that the Court in *Wilks* never held that the due process rights of the Wilks respondents were violated. The City agreed that the Wilks respondents could challenge the consent decrees, but argued that this opportunity was confined to intervention in the original action under Fed. R. Civ. P. 24 (an option that was no longer available because of the timeliness requirement). This Court held that this was an erroneous reading of the Federal Rules of Civil Procedure: Rule 24 intervention is optional, not mandatory, and a party seeking to foreclose the challenge of another party must join him or her under Rule 19. 490 U.S. at 762-68. Absent some change in the rules — a change Congress made for civil rights cases when it overruled *Martin* in the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(n)(1) — there was no affirmative legal basis upon which to limit the choice of forum of parties in the position of the Wilks respondents.[16]

[16] This is how counsel of record for petitioners interpreted *Martin v. Wilks* in testimony he gave to Congress in connection with the statute that overruled it. See Hearing Before the Senate Comm. on Labor and Human Resources on S. 2104, 101st Cong., 1st Sess. 549-550 (1989) (prepared statement of

There is, nevertheless, suggestive dictum in *Martin* about due process. And it may well be that a point can be reached where a judgment's effects on a third party are so profound that the judgment should be treated "as if" that party were formally bound. The effect of the consent decrees in *Martin*, after all, was to give the defendants a complete defense that barred the plaintiffs' claim altogether; their defense may not have been labeled "*res judicata*," but it had precisely the same effect on their "legal rights." 490 U.S. at 759. The Court need not decide whether "effects" can become so consequential as to be tantamount to making a judgment binding, for the effects here are nowhere near that significant. Rather, as explained above, the effects of the Michigan decree on petitioners are incidental in a way that is common in litigation, limiting only their ability to call a single witness who is useful but not essential to their case. Such negligible consequences cannot possibly be equated with the situation in *Martin* or described as meaningful enough to rise to the level of a due process violation.

Laurence H. Tribe):

> Writing for a majority of five, Chief Justice Rehnquist argued that this result was a straightforward application of the Federal Rules of Civil Procedure. In the absence of an explicit congressional determination that Title VII litigation raises concerns warranting procedures that differ from those applicable in ordinary private law litigation, the Court declined to depart from the usual rule that an individual cannot be bound by a decision in a case to which he or she was not a party. The Court reasoned that, given the existing federal rules regarding the issue, a different decision would "require a rewriting rather than an interpretation of the relevant rules."

Professor Tribe went on to testify that the proposed statute was constitutional even though it would undoubtedly affect the rights of non-parties by virtue of the entry of a consent decree.

II. THERE IS NO JUSTIFICATION FOR MAKING AN EXCEPTION TO THE FULL FAITH AND CREDIT CLAUSE FOR THIS CASE

In Part II of their brief, petitioners assert that if the Full Faith and Credit Clause does apply it must yield to "overriding principles of law," in particular to "institutional and systemic interests in the integrity of judicial proceedings." Pet. Br. 18. The source of these avowed principles remains obscure. Petitioners do not claim that the district court could refuse full faith and credit on the basis of any Missouri public policy, which the law makes very clear would be improper. See *Yarborough v. Yarborough*, 290 U.S. 202 (1933); *Fauntleroy v. Lum*, 210 U.S. 230 (1908); RESTATEMENT (SECOND), § 117. A footnote in their brief suggests that a *federal* court may have overriding policy interests of its own, which could mean that petitioners are seeking an exception to full faith and credit applicable only in federal courts, presumably as a matter of federal common law. See Pet. Br. 18 n.8 ("Part II of this brief addresses the narrower, but critical, issue of a jurisdiction's interest in the integrity of its judicial proceedings — in this case of *federal* judicial proceedings") (emphasis in original). But the Court's precedents are unmistakably clear in holding that, absent an express exception created by Congress, state court judgments are entitled to the same effect in a federal court as in the court of a sister state. See, *e.g.*, *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984); *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982); *Allen v. McCurry*, 449 U.S. 90 (1980). It follows that petitioners must be seeking a limit on full faith and credit that is either required by or implicit in the Constitution itself.

In thinking about whether to create a new exception to the Full Faith and Credit Clause, it is important to bear in mind, as this Court has previously observed, that "[s]o far as *judgments*

are concerned * * * the actual exceptions have been few and far between." *Williams*, 317 U.S. at 294-95. Most of the rare exceptions are practically as old as the Full Faith and Credit Clause itself. See Scoles & Hay, *supra*, at 965-67, 984-86 (discussing exceptions for decrees relating to land and penal judgments). Indeed, in this century the Court has abolished one exception (the exception for tax judgments; see *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935)), prompting one leading commentator to observe that "[t]he area where nonrecognition is allowable has shrunk with time." Brilmayer, *supra*, at 183. Petitioners thus bear a heavy burden in seeking to justify creating a new exception to the Full Faith and Credit Clause. Yet none of the "overriding principles" they offer is sufficiently compelling to overcome this burden.[17]

1. Petitioners' first "overriding principle" is that the public has a right to "every man's evidence" (Pet. Br. 18 (quoting *United States v. Nixon*, 418 U.S. 683, 709 (1974)), a right they say is especially salient where former employees serve as "whistleblowers" to provide the public with information that would otherwise be concealed. Pet. Br. 19-24. To begin with, this is not a whistleblower case. Elwell is currently making his living testifying as a paid consultant about GM design and fuel systems. His testimony is based on known public information, largely because anything else he might be able to offer is protected by attorney-client privilege or the work-product doctrine. Thus, the Court need not worry here about whether to make an exception to full faith and credit for

[17] Even were the policies advanced by petitioners adequate to justify an exception to full faith and credit, it would not alter the outcome in this case, because any exception would be permissive rather than mandatory. Petitioners would therefore have to establish the additional fact that state or federal lawmakers had adopted the exception they propose. But Congress has not modified Section 1738, see *Matsushita*, 116 S. Ct. at 878 (quoting *Migra*, 465 U.S. at 80), and, as the court below held, Missouri's strong public policy is in favor of full faith and credit. Pet. App. 14a.

whistleblowers (in the unlikely event that such a problem ever actually arises).[18]

More fundamentally, while parties generally have fairly wide latitude in obtaining proof, their "right" to do so is anything but inviolate. As we observed above, the ability of parties to adduce even non-privileged evidence is qualified for a variety of extraneous reasons, most far less compelling than the constitutional policy reflected in the Full Faith and Credit Clause and its implementing statute. This is plainly true as to expert testimony: an expert may decline to be retained, in which case there is little a party can do to compel his or her testimony. Or one side in litigation may hire an expert first, sometimes for the express purpose of making that expert unavailable to the other side. Yet the Federal Rules of Civil Procedure not only permit this practice, they *protect* it. See Fed. R. Civ. Proc. 26(b)(4)(B) & 1966 Advisory Note (limiting discovery of experts retained but not to be called at trial and prohibiting discovery of experts "informally consulted"). Petitioners are thus wrong in saying that "what GM purported to purchase from Elwell * * * was not Elwell's to sell." Pet. Br. 19. Nor would the analysis change even if Elwell were considered an ordinary fact witness. A party's right to secure testimony from anyone with non-privileged information is still qualified and cabined by rules of evidence adopted to promote a broad range of extrinsic policies. See page 19, *supra*.

2. Petitioners next argue that courts in one state should not be permitted "to 'commandeer' the official processes of another sovereign," citing *New York v. United States*, 505 U.S. 144 (1992). Pet. Br. 24. Their reliance on *New York* is surprising, since the Court there expressly recognized that Congress *could* commandeer state courts to enforce federal law. 505 U.S. at 178. Indeed, in reaffirming this principle last Term

[18] If the issue were presented, however, the proper recourse would be to leave the decision whether to create an exception to Congress, which could amend or qualify Section 1738 if it thought this necessary.

in *Printz v. United States*, 65 U.S.L.W. 4731, 4733-34 (June 27, 1997), the Court acknowledged that "[t]he Constitution itself, in the Full Faith and Credit Clause, Art. IV, § 1, generally require[s] such enforcement with respect to obligations arising in other states." The Full Faith and Credit Clause is, by definition, a "commandeering" provision. Its whole purpose is to "interfere with the course of proceedings in the courts of another jurisdiction," Pet. Br. 24, by obligating those courts to recognize judgments of sister states, even when — *especially* when — this might mean enforcing rights contrary to forum policy. As the Court explained in *Morris v. Jones*:

> The function of the Full Faith and Credit Clause is to resolve controversies where state policies differ. Its need might not be so greatly felt in situations where there was no clash of interests between the States. The argument of convenience in administration is at best only another illustration of how the enforcement of a judgment of one State in another State may run counter to the latter's policy. But the answer given by *Fauntleroy v. Lum*, *supra*, is conclusive. If full faith and credit is not given in that situation, the Clause and the statute fail where their need is the greatest.

329 U.S. at 553.[19]

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[19] Quoting RESTATEMENT (SECOND), § 103, petitioners suggest that there may be a "limited exception" to full faith and credit for judgments "involv[ing] an improper interference with important interests of the sister State." Pet. Br. 24 n. 17. Of course, the RESTATEMENT itself cautions that "[t]he rule of this Section has an extremely narrow scope of application" and may be invoked only on "extremely rare occasions." RESTATEMENT (SECOND), § 103, comments *a*, *b*. But even were the provision to apply, its authority is doubtful. The exception is drawn from a law review article by Reporter Willis Reese. See Willis L.M. Reese & Vincent A. Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 171-77 (1949). Explaining that the theory of the exception is based on Justice Stone's dissenting opinion in *Yarborough v. Yarborough*, 290 U.S. 202 (1933), Professor Reese conceded that "it can fairly be said that this theory is one that has often been hinted at in the cases but rarely applied." 49

Petitioners offer a single relevant example to support their assertion that full faith and credit does not apply to judgments that interfere with the course of proceedings in another state's courts. Their brief describes this misleadingly in terms of "injunctions directed at the judicial process itself." Pet. Br. 26-27. To be accurate, the authorities they cite refer more narrowly to cases withholding full faith and credit from injunctions issued against the *prosecution of suit* in the courts of another state.

Petitioners are correct that lower courts have generally declined to give full faith and credit to antisuit injunctions, although this Court has never spoken to the issue. In our view, the decisions refusing to respect antisuit injunctions are dubious: A final judgment enjoining litigation is no different from any other final judgment. If the injunction is improper, the correct solution is to appeal, with final review available in this Court. The solution cannot be for the second state to ignore the injunction, thereby putting the parties in an impossible position and creating a situation in which courts from different states have issued directly conflicting decrees. *Cf. GTE Sylvania, Inc. v. Consumers Union*, 445 U.S. 375, 386 (1980). That is precisely what the Full Faith and Credit Clause is intended to prevent. As Justice (then Professor) Ginsburg has observed:

> A general rule of respect for antisuit injunctions running between state courts would take the problem out of the limbo between the due process clause and the full faith and credit clause in which it now flounders. State courts on the receiving end of such

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COLUM. L. REV. at 171. In fact, the only examples the authors provided were based on hypotheticals and dissents. *Id.* at 171-77. Nor had matters changed by the time the RESTATEMENT (SECOND) was approved two decades later, as another leading commentator observed: "There is * * * no authority whatsoever for the startling proposition [found in § 103]." Albert Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230, 1240 (1965). Time has not improved the situation, as courts have properly resisted this misguided attempt to convert a narrow set of specific exceptions into a general ad-hoc one.

> injunctions have not found this a palatable solution, but it would be consistent with the generally strict line the Supreme Court has taken on full faith and credit to judgments.

Hon. Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 828 (1969).

In any event, the proper handling of antisuit injunctions is yet another issue raised by the petitioners that need not be decided to resolve the question actually before the Court. This is so for two reasons. First, and most obvious, the Michigan decree is *not* an antisuit injunction. As we have repeatedly observed, no one is trying to stop petitioners from pursuing their tort claim against GM in Missouri. GM asks only for enforcement of the judgment it obtained against Elwell, recognizing that this has an incidental effect on petitioners' litigation strategy. Petitioners say that the need to deny full faith and credit in this case "follows *a fortiori*" (Pet. Br. 27) from the antisuit injunction cases. But the "interference" entailed by requiring the district court to respect Michigan's judgment is far less severe than that imposed by an antisuit injunction, which precludes a second court from hearing the case at all. It is less severe even than the run-of-the-mill case in which full faith and credit calls for the forum to dismiss on *res judicata* grounds, again depriving it of any opportunity to adjudicate.

Second, the only plausible rationale for denying full faith and credit to antisuit injunctions is that they do not go to the merits of a suit, but rather are intended *solely* to prevent another court from deciding a case so that the enjoining forum can do so. See Leflar, McDougal & Felix, *supra*, at 246-247 (some antisuit injunctions amount "to a decision on the merits and bar[] a later suit"; others are "granted because of the inconvenience of an action" being brought elsewhere, are "not based on the substantive merits," and are not enforced by a

second court); Ginsburg, *supra*, 82 HARV. L. REV. at 823 (antisuit injunctions that have not been enforced were granted for reasons other than the merits). Antisuit injunctions, in other words, are designed to "keep litigation at home," and thus could risk generating the sort of friction that the Full Faith and Credit Clause is meant to prevent. *Cf. Tennessee Coal, Iron & R.R. Co. v. George*, 233 U.S. 354 (1914) (in applying another state's law, the forum may disregard provision requiring venue in the other state); *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965) (same). Whatever the strength of this justification as a reason to deny full faith and credit, it is plainly inapplicable to the injunction here. Michigan did not enjoin Elwell in order to deny other states the opportunity to adjudicate a dispute that it wanted to handle itself. Rather, the injunction was an indispensable part of the final resolution *on the merits* of a lawsuit before the Michigan court. By ignoring the decree, other states eviscerate the effectiveness of the Michigan judgment and so undermine Michigan's and GM's legitimate finality interests.

3. Petitioners' final argument (Pet. Br. 27) is that enforcing the Michigan injunction is inconsistent with the principle of *Donovan v. City of Dallas*, 377 U.S. 408 (1964), that a state court cannot enjoin parties from pursuing an action in federal court. The point is makeweight and adds nothing to what has already been said. *Donovan* establishes that state courts lack power to issue antisuit injunctions directed at federal courts, a proposition we have no reason to question here. But that has nothing to do with this case, since the Michigan court has not enjoined petitioners from pursuing their litigation in federal court. If, on the other hand, petitioners mean to say that it follows from *Donovan* that no state court judgment can affect the proceedings in a federal court, a complete answer is provided by this Court's decision in *Matsushita Elec. Indus. Co. v. Epstein*, 116 S. Ct. 873 (1996). The Court there held that the entry by a Delaware court of a consent decree disposing of claims that were within the exclusive jurisdiction of the federal court nevertheless required the federal court to dismiss.

What petitioners fail to grasp is that the Full Faith and Credit Clause is itself a kind of antisuit injunction. It gives one court authority, by rendering a final judgment on the merits, to control the course of litigation in another court. Whether or not there should be an exception for decrees whose *sole* purpose is to control other courts (as opposed to resolving the merits of a dispute before the rendering court) is an issue that need not be decided here. This case presents what is really just a routine question of full faith and credit to which the proper answer is clear: the judgment of the Michigan court must be respected.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed and the case remanded for a second trial.

Respectfully submitted.

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JULY 1997

We gratefully acknowledge the assistance of Professor Larry Kramer of New York University Law School in the preparation of this brief.

APPENDIX

PRODUCT LIABILITY ADVISORY COUNCIL, INC.
LIST OF CORPORATE MEMBERS

3M
ACRISON, Inc.
Allegiance Healthcare Corporation
AlliedSignal, Inc.
Aluminum Company of America
American Automobile Manufacturers Assn.
American Brands, Inc.
American Home Products Corporation
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Atlantic Richfield Company
BASF Corporation
Baxter International Corp.
Bayer Corporation
Becton-Dickinson & Company
Beech Aircraft Corporation
BIC Corporation
Black & Decker (U.S.) Inc.
BMW of North America, Inc.
Boeing Company, The
Bridgestone/Firestone, Inc.
Briggs & Stratton
Bristol-Myers Squibb Company
Brown-Forman Corporation
Budd Company, The
C.R. Bard, Inc.
Case Corporation
Caterpillar, Inc.
CBI Industries, Inc.
Chrysler Corporation
Ciba-Geigy Corporation
Clark Material Handling Company
Club Car, Inc.
Coleman Company, Inc., The
Continental General Tire, Inc.
Coors Brewing Company
Corning Incorporated
Daewoo Motor America
Dana Corporation
Deere & Company
Dow Chemical Company, The
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Estee Lauder Companies
Exxon Corporation
FMC Corporation
Ford Motor Company
Freightliner Corporation
Gates Rubber Company, The
General Electric Company
General Motors Corporation
Glaxo Wellcome Co.
Goodyear Tire & Rubber Company
Great Dane Trailers, Inc.
Guidant Corporation
H.B. Fuller Company
Harnischfeger Industries
Heil Company, The
Hoechst Celanese Chemical Group, Inc.
Hoechst Marion Roussel, Inc.
Honda North America, Inc.
Hyundai Motor America
International Paper Company
Isuzu Motors America, Inc.
Johnson Controls, Inc.
Kaiser Aluminum & Chemical

Corporation
Kawasaki Motors Corp., U.S.A.
Kraft Foods, Inc.
Loewen Group International, Inc.
Lorillard Tobacco Company
Lucent Technologies, Inc.
Mack Trucks, Inc.
Maytag Corporation
Mazda (North America), Inc.
Medtronic, Inc.
Melroe Company
Mercedes-Benz of N. America, Inc.
Michelin North America, Inc.
Miller Brewing Company
Mitsubishi Motor Sales of America, Inc.
Monsanto Company
Motorola, Inc.
Navistar International Transportation Corp.
Nissan North America, Inc.
O.F. Mossberg & Sons, Inc.
Otis Elevator Co.
Owens-Corning Fiberglas Corporation
PACCAR Inc.
Panasonic Company
Pentair, Inc.
Pfizer Inc.
Pharmacia and Upjohn, Inc.
Philip Morris Companies, Inc.
Porsche Cars North America, Inc.
Procter & Gamble Co., The
Raymond Corporation, The
RJ Reynolds Tobacco Company
Rover Group, Ltd.
Schindler Elevator Corp.
Sears, Roebuck and Company
Sherwood, a Division of Harsco Corporation
Simon Access-North America
Smith & Nephew Richards, Inc.
SmithKline Beecham Corporation
Snap-on Incorporated
Sofamor Danek Group, Inc.
State Industries, Inc.
Sturm, Ruger & Co., Inc.
Subaru of America
Textron, Inc.
Thomas Built Buses, Inc.
Toro Company, The
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Inc.
UST (U.S. Tobacco)
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Westinghouse Electric Corp.
Whirlpool Corporation
Yamaha Motor Corporation, USA

(12)

NO. 96-653
IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

KENNETH LEE BAKER, et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF OHIO, COLORADO, UTAH AND THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF RESPONDENT GENERAL MOTORS CORPORATION

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STATEMENT OF *AMICI* INTEREST

Amicus State of Ohio and three other *amici* States wish to convey a narrow but important interest in this matter. We do not take sides with the parties on the underlying wisdom of the Michigan state court judgment. And we do not disagree with much of what our sister States have said about the risks of such a judgment in their *amici* brief supporting petitioner. *See* Amicus Brief of Missouri, *et al.* Instead, we wish to focus on a different risk -- the danger to our federalist structure and in the end to the States themselves of opening up a locally-managed public policy exception to the Full Faith and Credit Clause.

Crafted as an essential part of the Founders' plan to "form a more perfect Union," the clause requires States to respect the final judgments of their neighbors' courts. The commitment is not without cost, to be sure. The States must accept this obligation for better or worse, and therefore must respect judgments they might not have issued themselves. But, at the same time, the clause preserves the integrity of all State-court judgments in the aggregate, ensures the citizenry of each State that they will not have to relitigate final decisions anew in State after State, and carries with it its own safety valve -- the explicit authority of Congress to enact legislation modifying the effect of the clause.

What Justice Story said about the clause in the nineteenth century remains true today:

> What State has a right to proclaim, that the judgments of its own courts are better founded in law or in justice, than those of any other State? The evils of introducing a general system of reexamination of the judicial proceedings of other States, whose connections are so intimate, and whose rights are so interwoven with our own, would far outweigh any supposable benefits from an imagined superior justice in a few cases.

Joseph Story, 3 Commentaries on the Constitution of the United States, § 1310 (Thomas M. Cooley, ed.1873). In view of the importance of preserving this vital glue that binds the States together, we offer this *amici* brief in support of respondent.

SUMMARY OF ARGUMENT

In unbending terms, Article IV, section 1 compels States to give the same respect to other judgments that they wish given to their own. They thus "shall" give "full faith and credit" to the "judicial proceedings of every other State" in the Union, leaving no room for a judicially-enforced public policy exception to the clause. But while the Framers did not permit the States to create *ad hoc* exceptions to the enforcement of other State-court final judgments, they did vest power in Congress to regulate the impact of the clause. In accordance with the second sentence of the clause, Congress may "prescribe" its "effect" by legislation. In exercising that power, Congress thus far has not chosen to create a broad public policy exception to the clause, or for that matter a narrow injunction exception.

The Court has been steadfast in adhering to the no-nonsense words of the clause and the statute. Starting with *Mills v. Duryee*, 7 Cranch 481 (1813), the Court made clear that the clause gave Congress power to "give a conclusive effect to such judgments" and had in fact done so. Id. at 485. *Fauntleroy v. Lum*, 210 U.S. 230 (1908), later emphasized the strict requirements of the clause: forcing the Supreme Court of Mississippi to give effect to a Missouri judgment that violated Mississippi's public policy against futures contracts, to do so with respect to a contract made

within Mississippi, and ultimately to honor a judgment that misread Mississippi law.

Nor does a literal reading of the Constitution and statute leave litigants without recourse. They may challenge the original judgment in the issuing court. And Congress of course remains empowered to address public policy concerns in legislating under the clause, as it has done on several occasions. *See, e.g.* 28 U.S.C. §1738A; §1738B. In conspicuous contrast, a changeable duty to enforce the clause could well have a disfiguring effect, jeopardizing state comity and risking the finality of agreeable as well as disagreeable State-court judgments. This Court has never recognized a public policy exception to the Full Faith and Credit Clause, and should not do so now.

ARGUMENT

I. Neither the Text of the Full Faith and Credit Clause Nor Its Implementing Legislation Contains a Public Policy or an Injunction Exception.

A. The Text of the Clause Does Not Contain Any Such Exception.

> Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

U.S. Const, Art. IV, § 1.

The Full Faith and Credit Clause constitutionalizes the golden rule. By establishing that the States "shall" give "full faith and credit" to the "judicial proceedings of every other State" in the Union, the clause compels each State to give the same full respect to other judgments that it wishes to see given to its own. The clause thus simultaneously gives and takes State power: It ensures the States that their final judgments will be respected across State lines but at the same time requires them to accord full respect to the judgments of others.

Nothing about the words of the first sentence to this give-and-take requirement offers any hint that State courts retain discretion to pick and choose which final judgments to honor. The obligation under the clause is mandatory in nature (using the imperative "shall"), and must be given to its "full[est]." Nor is there anything agnostic about the object of that duty -- to give "faith and credit" to all "judicial proceedings" of other States, whether agreeable or disagreeable, whether in law or in equity.

The context of the clause amplifies this conclusion. Having set forth the powers of the branches of the national government in the first three articles, the Framers appropriately used Article IV to address important State rights and State responsibilities in our federal scheme. Section one compels the States to honor the "acts, records, and judicial proceedings" of their sister States. Section two establishes privileges and immunities for State citizens and extradition rights of the States. Section three establishes a procedure for admitting new States to the Union by Congress as well as congressional power over United States property and claims. And section four guarantees a republican form of government to the States along with protection from invasion. All sections considered, Article IV embodies the necessary requirements of a compact among the several

States on the one hand and between the United States and the States on the other. An exception-ridden Full Faith and Credit Clause, which could be altered whenever a need for alteration was found, would undermine one of the essential components of the article.

But the most compelling textual evidence on this score comes not from the context of the clause or the words of its first sentence. Rather it comes from the second sentence of the clause, which in no uncertain terms vests Congress with the power to "prescribe" the "effect" of the judicial proceedings in one State in those of another. When it came to developing public policy in this area, in other words, the Framers explicitly established that Congress, not State or federal courts, would police and monitor the Clause's operation, and where necessary modify its impact. This was a quintessentially appropriate allocation of power to the national government -- in view of the parochial risks of leaving to the States the job of determining the effect of a neighbor's judgment in their own courts – and no less appropriate to vest this power in Congress, which is so well suited to resolving the kinds of national public policy issues that could arise under the clause. In the final analysis, the first sentence of the clause creates an obligation strictly enforceable in this Court, and the second sentence gives Congress power to modify that obligation for a variety of public policy reasons.

B. The Full Faith and Credit Statute Does Not Permit Public Policy Or Injunction Exceptions.

Exercising the power given to it, Congress has in fact passed legislation under the clause and first did so almost immediately after the Constitution was ratified, passing

initial legislation in 1790. 1 Stat. 122. In its essentially unchanged form, the statute now reads:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

28 U.S.C. § 1738 (1997).

The legislation clarifies that all courts in the Union must obey the requirement, not just those of the States. And, in ensuring that these courts must give the "same" full faith and credit that the original court would have given the judgment, the legislation emphasizes that courts are bound to treat a judgment with the same respect due it in the court of origin. Conspicuously missing from the statute, like the constitutional clause before it, is any judicial leeway to exempt disagreeable judgments generally or injunctions specifically from its coverage.

II. The Framers Intended To Give Congress, Not State And Federal Courts, Power To Modify And Implement The Full Faith and Credit Clause.

The respect due the judgment of one jurisdiction in that of another was not a new one in 1787. Colonial courts as well as English courts at common law had long wrestled with the problem. While the phrase "full faith and credit" had little usage prior to its appearance in the Articles of Confederation, the terms "faith" and "credit" were frequently used in this context in English law from at least

the sixteenth century, most frequently to denominate the effect of ecclesiastical court decisions or foreign judgments in common law courts.

In all fairness, however, neither the English common law experience nor the colonial experience is conclusive. In some instances, the terms "faith" and "credit" were indeed used by English courts in giving complete and preclusive effect to judgments of foreign courts. *See Burroughs v. Jamineau,* 25 Eng. Rep. 235 (Ch. 1726) (chancery court gave preclusive effect to foreign judgment in granting an injunction)*; Badtolph v. Bamfield*, 23 Eng. Rep. 102 (Ch. 1674) (chancery court gave effect to Icelandic judgment); *Jurado v. Gregory*, 86 Eng. Rep. 23 (K.B. 1670) (English court gave preclusive effect to a "sentence obtained in a foreign Admiralty"). At the same time, however, other English cases cast doubt on the consistency of this tradition. *See Dupleix v. DeRoven*, 23 Eng. Rep. 950 (Ch. 1705) (French judgment not given preclusive effect in England); *Gage v. Bulkeley,* 27 Eng. Rep. 824 (Ch. 1744) (debt upon a foreign judgment given only evidentiary effect); *Walker v. Witter,* 99 Eng. Rep. 1 (K.B. 1778) (foreign judgments were grounds of action but reexaminable; "faith" used to indicate conclusive effect); *Galbraith v. Neville*, 99 Eng. Rep. 5 (K.B.1789) (foreign judgment given the evidentiary effect of any other record or written agreement).

But the lack of conclusiveness about these traditions has less to do with the meaning of the words "faith" and "credit" than it does with the inaptness of the comparison. Neither the English nor the colonial court experience with "foreign" judgments is apt in view of the clause's applicability solely to the States of a Union. And neither experience involved a judicial system that combined law and equity, with all decisions under federal law finally determinable in a national supreme court.

Against this historical backdrop, a full faith and credit clause was added to the Articles of Confederation in 1777. The clause read as follows:

> Full Faith and Credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

19 Journals of the Continental Congress, Ford ed., 214, 215 (1912). Few cases construed the clause, and the cases that did offer little insight into its meaning. The same language was then incorporated in the United States Constitution, except that the Framers added an "effects" clause.

The notes of the constitutional debates reveal that the Framers sought to give the Full Faith and Credit Clause more binding and preclusive effect than the antecedent clause in the Articles of Confederation. "[J]udgments in one state," some delegates explained "should be the ground of actions in other states." 2 Farrand, The Records of the Federal Convention of 1787, rev. ed., 447-489 (1911). James Wilson of Pennsylvania advocated that the legislature should "declare the effect" of the clause; otherwise "the provision would amount to nothing more than what now takes place among all independent nations." Farrand, *supra*, at 483; *see also*, *Huntington v. Attrill*, 146 U.S. 657, 684 (1892) (referring to "the less perfect provision" of the Articles of Confederation).

Madison likewise recognized the importance of giving Congress the power to ratchet up or ratchet down the effect of the clause:

> The power of prescribing, by general law, the manner in which the public acts, records, and

> judicial proceedings of each state shall be proved, and the effect they shall have in other states, is an evident and valuable improvement on the clause relating to the subject in the articles of confederation. The meaning of the latter is extremely indeterminate; and can be of little importance under any interpretation which it will bear. The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contingent States, where the effects liable to justice may be suddenly and secretly translated, in any stage of the process, within a foreign jurisdiction.

The Federalist No. 42. Nowhere in the debates or other materials surrounding the passage of the clause in the Constitution is the question of an exception based on public policy or injunctive relief raised. *See* Farrand, *supra*, at 445-449 (1911).

III. This Court's Holdings Make No Exception To The Clause For Public Policy Reasons or Injunction Decisions.

In the immediate years after the ratification of the Constitution and the passage of full faith and credit legislation, several States resisted honoring the final judgments of other jurisdictions. For example, in *Hitchcock v. Aicken*, 1 Cai. R. 460 (N.Y. 1803), the highest court of New York refused to give preclusive effect to a judgment obtained in Vermont. The same court, in *Taylor v. Briden*, 8 Johns. R. 172 (N.Y. 1811), held that a judgment from Maryland had only *prima facie* evidentiary effect in New York. Other State courts reached similar results. *See Wright*

v. Tower, 1 Browne's Rep. App.1 (Pa. 1801) (Act of 1790 did not determine effect of judgments of courts from other states); *Hammon and Hattaway v. Smith*, 3 S.C. L. (1 Brev.)110 (1802) (North Carolina judgment only *prima facie* evidence of debt in South Carolina court; act of Congress did not declare effect of judgments from other States); *Bartlett v. Knight*,1 Mass Rep. 401 (1805) (New Hampshire judgment did not have to be given effect in Massachusetts).

Not until *Mills v. Duryee*, 7 Cranch 481 (1813), did the Supreme Court have an opportunity to clarify the binding nature of the full faith and credit obligation. At issue in *Mills* was whether a judgment issued by a court in New York had conclusive effect in a court of the District of Columbia. Writing for the Court, Justice Story concluded:

> It is manifest . . . that the constitution contemplated a power in congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive, when a court of the particular state where it is rendered would pronounce the same decision.

Id. at 485.

Story later elaborated on this view in his widely-read *Commentaries*:

> [W]hat, then is meant by full faith and credit? Does it import no more than that the same faith and credit are to be given them, which, by the comity of nations, is ordinarily conceded to all foreign judgments? Or is it intended to give them a more conclusive

> efficiency, approaching to, if not identical with, that of domestic judgments; so that, if the jurisdiction of the court be established, the judgment shall be conclusive as to the merits? The latter seems to be the true object of the clause; and, indeed, it seems difficult to assign any other adequate motive for the insertion of the clause.

Story, *supra,* §1309.

"[W]ithout question," Story also viewed the clause as designed to cure the lack of preclusive effect given by post-Articles of Confederation State courts. *Id.* at §1309. In discussing the ties that necessarily bound the States of the new Union, Story added:

> Under such circumstances, it could scarcely consist with the peace of society, or with the interest and security of individuals, with the public or with private good, that questions and titles, once deliberately tried and decided in one State, should be open to litigation again and again as often as either of the parties, or their privies should choose to remove from one jurisdiction to another. It would occasion infinite injustice, after such trial and decision, again to open and reexamine all the merits of the case. It might be done at a distance from the original place of the transaction; after the removal or death of witnesses, or the loss of other testimony; after a long lapse of time, and under circumstances wholly unfavorable to a just understanding of the case.

Story, *supra*, §1309.

The Court continued to adhere to these principles throughout the nineteenth century. See, e.g., *Hampton v. McConnel*, 3 Wheat. 234 (1818) (New York judgment given effect in South Carolina); *Mayhew v. Thatcher* et al., 6 Wheat. 129 (1821) (Massachusetts judgment given effect in Louisiana); McCormick v. Sullivant, 10 Wheat. 192 (1825) (unreversed decree a bar to action in another State); *Christmas v. Russell*, 5 Wall. 290 (1866) (judgment of Kentucky court given preclusive effect in Mississippi; rejects arguments for public policy exception); *Cheever v. Wilson,* 9 Wall. 108 (1869) (divorce decree from Indiana valid in Washington, D.C. despite public policy against decree in Washington).

Nor did the Court make any exception for equitable decrees. In 1847, it found that alimony payments, as ordered by the Court of Chancery of New York, must be given binding force in all other States. *See Barber v. Barber*, 21 How. 582, 591 (1847). The Court reached a similar conclusion some sixty years later in *Sistare v. Sistare*, 218 U.S. 1 (1910), in which it held that a judgment for alimony must be accorded full faith and credit. More recently, in *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Ass'n*, 455 U.S. 691, 716 (1982), the Court accorded full faith to the judgment of an Indiana rehabilitations court and its power to enjoin suits that may interfere with the receivership process.

The Court continued to resist litigants' efforts to create a public-policy exception to the full faith and credit requirement at the dawn of the twentieth century. In *Fauntleroy v. Lum*, 210 U.S. 230 (1908), plaintiff and defendant entered into a contract for "futures," which was illegal under Mississippi law. When a dispute over the contract arose, the parties submitted it to a Mississippi arbitrator who found for plaintiff. Plaintiff then sued in a

Mississippi court to recover on the arbitration award, but dismissed the action when the illegality of the contract was brought to the court's attention. Plaintiff next filed an action in a Missouri court, which rejected the illegality argument and upheld the arbitrator's decision. When plaintiff tried to enforce his Missouri judgment in Mississippi, the State court refused to give it full faith and credit because the underlying contract violated Mississippi law and because the Missouri court had misunderstood the relevant Mississippi law.

> "A judgment is conclusive," the Court reaffirmend, as to all the media concludendi; and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon a mistake of law.

Id. at 237 (citation omitted). It is doubtful that a more compelling explanation for creating a public policy exception could be conceived than the facts of *Fauntleroy*. Still, this Court compelled Mississippi to give effect to a judgment that violated the State's public policy against futures contracts, forced it to do so with respect to a contract made *within* the State, and in the end required Mississippi to honor a judgment that misread Mississippi law.

Nor do any of the instances in which the Court has declined to give full faith and credit to State-court judgments advance petitioners' position. For example, when a court lacks jurisdiction over a person or the subject-matter of the dispute, its judgments need not be recognized by another jurisdiction. Yet that does not reflect on the force of the Full Faith and Credit Clause, but rather the time-honored doctrine that such decrees are void from the outset in *all* courts under principles of due process, including courts in the issuing State. *See, e.g., Durfee v. Duke*, 375 U.S. 106 (1963);

Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888).

For like reasons, one State may not directly affect title to land located in another State. *Fall v. Eastin*, 215 U.S. 1 (1909). This, too, reflects a jurisdictional defect, as one State may never possess jurisdiction over the land in another State. *Id.* at 14. Nor may one State assume jurisdiction over the criminal laws of another State, which explains the penal exception to the clause. *See Huntington v. Attrill*, *supra* (prohibiting enforcement of a judgment to "punish an offence against the public justice of the state," rather than to "afford a private remedy to a person injured in a wrongful act").

Nor do the various policy arguments asserted by petitioners tenably advance the position that the courts, as opposed to Congress, retain authority to determine as a matter of policy which judgments warrant full faith and credit and which do not. No doubt the full faith and credit obligation has an extraterritorial effect, forcing courts to dignify a judgment they might not otherwise have issued themselves. But that is simply the nature of the clause and ultimately one of the bargains of a nation that created "one out of many." It is simply one of the necessary compromises of a workable Union that we "require[] a state court to take jurisdiction of an action to enforce a judgment recovered in another state, although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy." *Howlett v. Rose*, 496 U.S. 356, 383 (1990).

Nor does this view of the clause close off all avenues of recourse. Litigants of course may always challenge the original judgment in the issuing court, which may well be a particularly fruitful approach when it comes to challenging injunctions. And if general concerns arise about over- or under-enforcement of the clause, Congress "may by general

laws prescribe the . . . effect" of the clause, which it has done on several occasions. *See, e.g.*, 28 U.S.C. §1738A (1997) (full faith and credit due child custody determinations); 28 U.S.C. §1738B (1997) (full faith and credit due child support orders).

In the last analysis, a changeable duty to enforce the clause, while resolving the exigencies of the moment, would ultimately place at risk the enforceability even of the most agreeable judgments. Assume, for example, that the Michigan court in this instance had *permitted* the witness to testify in other actions against his former employee. A full-faith-and-credit rule that allowed judgments *prohibiting* testimony to be ignored could apply just as forcefully to those *permitting* such testimony. In short, aside from Congress's recognized power to legislate under the clause, the Court has never recognized a public policy exception to the Full Faith and Credit Clause. It should not do so now.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should resist petitioners' invitation to create a public-policy or injunction exception to the Full Faith and Credit Clause.

Respectfully submitted,

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Date: July 21, 1997

No. 96-653

In the Supreme Court of the United States

OCTOBER TERM, 1996

KENNETH LEE BAKER and STEVEN ROBERT BAKER,
by his next friend, MELISSA THOMAS,
Petitioners,
vs.
GENERAL MOTORS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF NATIONAL ASSOCIATION OF MANUFACTURERS AND NEW ENGLAND LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

Amici Curiae National Association of Manufacturers and New England Legal Foundation respectfully submit this brief in support of the Respondent, General Motors Corporation. All parties have consented to the filing of this brief.

The National Association of Manufacturers ("NAM") is the nation's oldest and largest broad-based industrial trade association. Its more than 14,000 member companies and subsidiaries, including 10,000 small manufacturers, employ approximately eighty-five percent of all manufacturing workers in the United States and produce over eighty percent of the nation's manufactured goods. More than 158,000 additional businesses are affiliated with the NAM

through its Associations Council and National Industrial Council. As manufacturers often involved in litigation in the several States, the NAM's membership has an abiding interest in the proper and consistent application of the Full Faith and Credit Clause in order to ensure that one State's judgments are accorded finality and respect by the courts of other States.

New England Legal Foundation ("NELF"), a non-profit, public interest law firm, was incorporated in 1977. Its membership consists of corporations, individuals and others who support NELF's mission of promoting balanced economic growth, protecting the free enterprise system and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small corporations from all parts of New England and the United States. NELF has regularly appeared before this Court, as party or counsel, in cases raising settlement and/or employment law issues. *See, e.g., Amchem Products v. Windsor*, 65 U.S.L.W. 4653 (June 25, 1997); *Lockheed Corp. v. Spink*, 116 S.Ct. 1783 (1996); *O'Connor v. Consolidated Coin Caterers Corp.*, 116 S.Ct. 1307 (1996). NELF's members and supporters are concerned with the sanctity of injunctions, especially those that are used to settle employment disputes, and with ensuring that they cannot be circumvented lightly by those with unrelated claims for relief. NELF believes that this brief will give the Court an additional perspective that may assist in determining the proper scope of the injunction here and whether the federal district court's refusal to honor the Michigan state court injunction was contrary to the Full Faith and Credit Act.

SUMMARY OF ARGUMENT

The Eighth Circuit correctly held that the Full Faith and Credit Clause and its implementing statute require a federal court in Missouri to enforce the obligations created by a

permanent injunction issued by a Michigan state court with jurisdiction over the person that is the object of the injunction.

1. The Full Faith and Credit Clause and its implementing statute require that a permanent injunction of a Michigan court be given the same effect that the injunction would be given under Michigan law, including the rule of Michigan law that a judgment must be honored unless and until modified *by the issuing court*. The full faith and credit obligation applies to all "judicial Proceedings," and there is no exception to the obligation for injunctions or other equitable decrees. Nor may a state refuse to honor another state's judgment on the ground that it violates the "public policy" of the forum state. The purpose of the Full Faith and Credit Clause was to eliminate such conflicts between States by requiring them to honor one another's judgements. Recognizing such exceptions would allow one State to substitute its judgment for that of the rendering State, contrary to the clear command of Article IV, Section 1 and 28 U.S.C. § 1738 that "Full" faith and credit be given state court judgments.

2. Although Petitioners claim that honoring the injunction would violate their rights under the Due Process Clause, they can point to no life, liberty or property interest that is implicated in this case. The injunction does not bar Petitioners' cause of action nor does it "bind" them in any relevant sense. To the extent that Petitioners complain that enforcing the injunction against Elwell will affect adversely their ability to present evidence in their case, the appropriate remedy under Michigan law and as a matter of full faith and credit is for them to seek relief from the issuing court. This requirement does not violate the Due Process Clause.

ARGUMENT

I.

THE FEDERAL DISTRICT COURT MUST ACCORD FULL FAITH AND CREDIT TO THE MICHIGAN JUDGMENT

A. The Michigan Judgment Must Be Accorded The Same Effect That It Would Have Under Michigan Law, Which Provides That The Judgment Is Binding And Enforceable And Cannot Be Modified Except By The Issuing Court

1. The Effects Of A Judgment Under The Law Of The Rendering State Determine The Faith And Credit That Other Courts Must Give It

The Full Faith and Credit Clause was a critical component of the Constitution's plan to transform the States from independent sovereigns into a unified nation. The Clause was to be a nationally unifying force "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of state of its origin." *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 276-77 (1935).

The Clause provides that:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

U.S. Const., Art. IV, § 1.

The Clause differs from the predecessor provision in the Articles of Confederation, which did not contain any provision for determining the manner of proof and the effect of state judgments, thus presumably leaving those matters to the state courts themselves. *See* ARTICLES OF CONFEDERATION, Art. 4. By stating that the newly constituted national legislature could decide these matters, the Constitution ensured that the Full Faith and Credit Clause would receive uniform application among the States — a point that James Madison emphasized. *See* THE FEDERALIST No. 42 (Madison).

Shortly after ratification of the Constitution, Congress exercised its power under Article IV, § 1 to provide for the manner of proof and the effect of state court judgments by enacting a statute providing that the judgment of every state court shall be given "such faith and credit . . . in every court within the United States as they have by law or usage in the courts of the state" that rendered the judgment. Act of May 26, 1790, ch. 11, 1 Stat. 122. The current version of the statute provides that judgments must be given "the same full faith and credit" as they would receive in rendering State. 28 U.S.C. § 1738 (emphasis added).

This Court has articulated this principle as a bedrock of the Full Faith and Credit obligation. Thus, in *Mills v. Duryee*, 11 U.S. (7 Cranch) 481, 485 (1813), Justice Story stated for the Court that "we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision." Chief Justice Marshall reiterated this fundamental principle, stating "the judgment of a state court should have the same credit, validity and effect, in every other court in the United States, which it had in the state where it was pronounced . . ." *Hampton v. M'Connel*, 16 U.S. (3 Wheat.) 234, 235 (1818).

This Court's more recent precedents confirm that a state court judgment must be treated "with the same respect that it would receive in the courts of the rendering state." *Matsushita Elec. Indus. Co. v. Epstein,* 116 S. Ct. 873, 877 (1996). *See also Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373 (1985). Generally speaking, this means that where the judgment would be binding and enforceable in the rendering State, it likewise should be binding and enforceable in another State. *Matsushita,* 116 S. Ct. at 877.

2. Under Michigan Law, The Injunction Is Binding Unless And Until It Is Vacated Or Modified By The Issuing Court

Under Michigan law, the judgment against Ronald Elwell is fully binding and enforceable — and is no less so because it takes the form of an injunction, or because the injunction was entered by consent, or because the issuing court retains the power to modify the injunction upon an appropriate showing. Most significantly, Michigan law permits modification only by the issuing court, even if sought by an adversely affected nonparty to the original action.

Michigan law accords binding and enforceable effect to a judgment so long as it is "final," and treats a judgment as "final" as soon as it is rendered, subject to a brief waiting period in case of monetary judgments. *McHugh v. Trinity Bldg. Co.*, 254 Mich. 202 (1931); Mich. Ct. R. § 2.614. The same rules (except for the waiting period) apply to injunctions, which are accorded full, binding and enforceable effect immediately upon entry. *Niles v. Lee*, 169 Mich. 474, 483 (1912); *City of Troy v. Hershberger,* 27 Mich. App. 123, 127-28 (1970). *See also* Mich. Ct. R. § 7.203(A)(1) (according "finality" to orders as well as judgments at law); *id* at § 2.614(A)(2)(c) (providing that injunctive relief may be included in a final judgment). Michigan law accords similar final, binding and enforceable effect to a judgment

entered into as a result of a settlement between the parties. *See In re Estate of Meredith*, 275 Mich. 278, 289 (1936); *Tudryck v. Mutch*, 320 Mich. 99, 104-05 (1948).

That a judgment, including an injunctive decree, may be modified at a later time by the issuing court does not affect its finality for purposes of appeal, res judicata, or enforcement. As under federal practice, see Fed. R. Civ. P. 60(b), Michigan law provides that all final judgments may be modified on grounds of mistake, newly discovered evidence, fraud, or inequitable prospective application, or on the ground that the judgment is void. Mich. Ct. R. § 2.612. Nonetheless, Michigan courts consistently enforce permanent injunctions and give them res judicata effect. *See First Protestant Reformed Church v. De Wolf*, 358 Mich. 489, 494-95 (1960); *Gruber v. Dodge*, 45 Mich. App. 33, 36 (1973); *City of Troy*, 27 Mich. App. at 125-27; Mich. Ct. R. § 2.703(A)(1) (possibility of modification does not affect the finality of a judgment or order).

With the exception of judgments that are void on account of fraud or lack of personal or subject matter jurisdiction, any judgment under Michigan law, including an injunction, may be modified or vacated only by the specific judge who issued it, so long as that judge is present and capable of acting. Mich. Ct. R. § 2.613; *Wilson v. Romeos*, 387 Mich. 664, 678 (1972). This rule applies to motions for modification under § 2.612 of the Michigan Rules of Court, *see Huber v. Frankenmuth Mutual Insurance Co.*, 160 Mich. App. 568, 574-76 (1987), as well as motions to set aside consent judgments, *see Berar Enterprises, Inc. v. Harmon*, 101 Mich. App. 216, 228 (1980). Thus, Michigan does not allow a collateral attack on an injunction in another Michigan court, unless the first court lacked subject matter jurisdiction. *Huber*, 160 Mich. App. at 574. Michigan's policy underlying this rule is to protect the integrity of the initial court's judgment, to avoid forum-shopping, and to

refer the motion to the judge presumptively most qualified to entertain it. *Id.; Liberty v. Michigan Bell Tel. Co.*, 152 Mich. App. 780, 783 (1986).

Under Michigan law, a third party adversely affected by an injunction may seek to modify it by filing a motion with the issuing court for intervention and then for modification, Mich. Ct. R. §§ 2.209, 2.612(C), 2.613(B), *D'Agostini v. City of Roseville*, 396 Mich. 185, 188 (1976) (persons who may be adversely affected though not "bound" by a suit may intervene as of right), and the issuing court has full discretion to grant the modification. *Sylvania Silica Co. v. Berlin Township*, 186 Mich. App. 73, 75 (1990). Modification may be granted if "it is no longer equitable that the judgment should have prospective application," Mich. Ct. R. § 2.612(C), or the court finds "any other reason justifying relief." *Id.* § 2.612(C). If the request is denied, that decision can be reviewed by Michigan appellate courts for abuse of discretion. *Michigan Bank-Midwest v. D.J. Reynaert, Inc.*, 165 Mich. App. 630, 642-43 (1988).

A request by a third party intervenor to modify a Michigan judgment, as with a request by a party, must be made to the judge that issued the order, so long as that judge is available. Mich. Ct. R. § 2.613(B). Indeed, on at least two occasions, persons not parties to the initial action between GM and Elwell tried to avoid enforcement of the injunction in actions before a different Michigan court. Respondent's Appendix D & E. In each of these cases, the Michigan judge hearing the second action rejected these requests, holding that the injunction would continue to be enforced unless and until the plaintiffs secured a modification by the issuing court. *Id.*

Thus, under Michigan law, an injunction otherwise binding on the parties is enforceable even it affects the interests of third parties. A third party who is adversely affected by an injunction and wishes to have it modified must make that

application as an intervenor to the issuing court. Michigan law provides a procedure through which such third party interests will be considered by the issuing judge — a process that is reviewable on appeal at the third party's request. The full faith and credit obligation requires a court in Missouri to honor the injunction to the same extent.

B. There Is No Exception To The Full Faith And Credit Clause Here That Would Authorize The Federal District Court To Refuse To Honor The Michigan Judgment

Given that the law of the issuing state determines the full faith and credit applicable to a judgment, and given that Michigan law makes the injunction here binding and enforceable against Elwell even if challenged by adversely affected third parties, other courts in the United States must give the order the same force and effect. There is no exception to the full faith and credit obligation that warrants a different result here.

1. There Is No Exception To The Full Faith And Credit Obligation For Injunctions Or Other Equitable Decrees

Petitioners suggest that the Full Faith and Credit Clause may not apply to the Michigan judgment because it is in the form of an injunction, implying that injunctions or equitable decrees somehow are not entitled to full faith and credit. Pet. Br. 25-28. There is no basis for this position in the text of the Full Faith and Credit Clause, the text of the implementing statute, the history of the Clause, or this Court's prior precedents — all of which compel the contrary conclusion that full faith and credit must be given to equitable decrees so long as they are binding and enforceable in the courts of the issuing State. As noted above, Michigan law gives full binding effect to injunctive decrees.

By its terms, the Full Faith and Credit Clause applies to all "judicial Proceedings," and does not distinguish between "equitable" and "legal" proceedings. This is highly significant, because other provisions of the Constitution make clear that when the Founders wished to draw such a distinction, they did so explicitly. Thus, the Seventh Amendment applies only to "suits at common law." Article III creates federal jurisdiction over "all Cases of admiralty and maritime Jurisdiction" without requiring a federal question or diversity of citizenship; over federal question "Cases, in Law and Equity"; and over diversity cases without distinction among law, equity, or admiralty. No textual distinctions between law and equity appear in the Full Faith and Credit Clause. Likewise, § 1738 does not distinguish between law and equity.

Nor is there support for Petitioners' argument in the history of the Full Faith and Credit Clause or in any background understanding about the nature of equity. To the contrary, in adopting the present version of the Clause, the Constitutional Convention left out proposed language that would have limited its operation to bankruptcy cases and protests based on foreign bills of exchange. 2 FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787 447 (1911). Bankruptcy jurisdiction, of course, historically has been considered equitable. *See, e.g., Katchen v. Landy*, 382 U.S. 323, 327 (1966). That the Founders considered and rejected this limitation belies the notion that the Clause was not meant to apply to cases in equity.[1]

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[1] Indeed, one of the early uses of the term "faith and credit" in English practice was to express the rule in the common law courts of giving effect to judgments of the ecclesiastical courts of equity. *See, e.g., Grove v. Elliott*, 2 Ventr. 41, 86 Eng. Rep. 474, 476 (1606) ("[w]e must give faith and credit to their [the ecclesiastical courts] proceedings, and presume they are according to their law"). *See generally* Nadelmann, *Full Faith and Credit to Judgments and Public Acts*, 56 MICH. L. REV. 33, 44-46 (1957)

Historically, equity decrees were considered binding in subsequent proceedings, as Blackstone explained in his Commentaries, and prevented relitigation of issues determined in equity. 3 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 452-55 (1768). He also explained that a right of appeal became necessary for equity decrees precisely because the equity courts' decrees were considered binding and often were used to resolve such issues as rights in real property. *Id.* at 454-55. Likewise, Justice Story commented that "a decree in equity is held of equal dignity and importance with a judgment at law." J. Story, COMMENTARIES ON EQUITY JURISPRUDENCE § 547 (1835).[2]

This Court's consistent precedents require full faith and credit for decrees that are in their nature equitable. *Matsushita Elec., supra* (class action in Delaware Chancery Court); *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins Ass'n*, 455 U.S. 691 (1982) (state conservatorship of an insolvent company); *Barber v. Barber*, 62 U.S. (1 How.) 582, 591 (1859) (divorce and alimony awarded by New York Chancery Court).[3] This

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[2] Justice Story discussed full faith and credit in his COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1297-1307 (1833), and recognition of judgments in his COMMENTARIES ON THE CONFLICT OF LAWS §§ 584-600 (1834): neither discussion contains the slightest hint of an equity exception.

[3] *Fall v. Eastin*, 215 U.S. 1 (1909) is consistent with this point. It held that neither a Washington decree nor a deed executed by the Washington court was effective of its own force to transfer title to land in Nebraska. The Full Faith and Credit Clause "does not extend the jurisdiction of the courts of one state to property situated in another, *but only makes the judgment rendered conclusive on the merits of the claim or subject-matter of the suit.*" *Id.* at 12 (emphasis added). Thus, the Court held that a plaintiff relying on the Washington decree must first sue on the decree and reduce it to a Nebraska decree, just as a plaintiff relying on a Washington damage judgment must get a Nebraska judgment prior to execution in Nebraska. It was the plaintiff's claim for

Court never has indicated that such decrees are subject to different treatment under either the Full Faith and Credit Clause or the corresponding statute.

Finally, all of the policies underlying the Full Faith and Credit Clause are fully applicable to equity decrees. The "risk of relitigation," which "inheres in our federal system," *Underwriters Nat'l Assurance Co.*, 455 U.S. at 704, is equally strong with injunctive decrees, and state courts have incentives just as strong to refuse enforcement of such orders. As noted above, the Clause was intended "to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation . . ." *Milwaukee County*, 296 U.S. at 276-77. Nothing in the nature of injunctive relief or in the nature of equity decrees would lend such decrees to an exception to this policy.

Petitioners erroneously suggest that *Donovan v. City of Dallas*, 377 U.S. 408 (1964), supports an exception for injunctions or otherwise shows "an absence of a Full Faith and Credit obligation" in this case. Pet. Brief at 27. In *Donovan*, this Court held that the Supremacy Clause forbade the state courts of Texas from enjoining litigants from invoking the jurisdiction of federal courts granted by an act of Congress. The Court did not hold that a federal court may refuse full faith and credit to a state court judgment where the only effect of enforcing the judgment would be to make a particular piece of evidence unavailable in the federal proceeding. In fact, with respect to the underlying judgment of the Texas court that the City's bond issue was legal, the Court expressly stated that

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"greater efficacy" for equity that the Court rejected. *Id.* 12-14. *See also id.* at 15 (Holmes, J., concurring) (equity decrees entitled to full faith and credit).

> [i]t may be that a full hearing in an appropriate court would justify a finding that the state-court judgment in favor of Dallas in the first suit barred the issues raised in the second suit, *a question as to which we express no opinion.*

377 U.S. at 412 (emphasis added). Thus, had the state court not issued a supplemental order enjoining the litigants from proceeding in federal court, the federal court would have had to give effect to the underlying judgment to the full extent that Texas law required. If Texas law required that the "first suit" be given preclusive effect, the "second suit" in federal court would have been "restrain[ed]" to the limited determination that the first judgment was *res judicata*. That is the effect on federal court proceedings in every case requiring the application of the full faith and credit obligation.

It also is significant that law and equity have been merged in the federal courts and in most States. In a merged system, legal and equitable claims may be joined in the same case, and the principal distinction between them lies in the remedy sought. *Chauffeurs Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990). An equity exception would produce absurd results in a merged system. First, a judgment ruling on both legal and equitable claims would be binding only as to the legal claims. But full faith and credit should apply to a judgment as a whole, not to selected parts of a judgment, depending upon whether they are "legal" or "equitable" in nature. *Cf. Evans v. Jeff D.*, 475 U.S. 717 (1986) (holding that plaintiff class could not retain the benefits of a settlement while rejecting other provisions that benefited defendants). Second, injunctive relief presupposes that a litigant has no adequate remedy at law. Restatement (Second) of Torts § 936 (1977). Thus, if equity decrees are not given full faith and credit, a litigant would face a choice between an inadequate remedy that would be final and

binding in all States and an adequate remedy that would be subject to collateral attack in every other State.

2. There Is No "Public Policy" Exception That Justifies A Refusal To Honor The Michigan Injunction

This Court long has held that there is no public policy exception to the obligation to give full faith and credit to the judgment of a State. *Fauntleroy v. Lum*, 210 U.S. 230 (1908); *Morris v. Jones*, 329 U.S. 545, 553 (1947); *Howlett v. Rose*, 496 U.S. 356, 382 n.26 (1990). Although the Court has held that a State is not required to apply an inconsistent *legislative* enactment of another State, *see Griffin v. McCoach*, 313 U.S. 498, 507 (1941), this Court has emphatically rejected the proposition that a *judgment* of another State can be ignored on ground that it is offensive to the policies of the forum State. *Howlett v. Rose*, 496 U.S. at 382 n.26 ("The full faith and credit clause requires a state court to take jurisdiction of an action to enforce a judgment rendered in another state, *although it might have refused to entertain a suit on the original cause of action as obnoxious to its public policy*.") (emphasis added).

A public policy exception would be inconsistent with the core concept of full faith and credit. "The function of the Full Faith and Credit Clause is to resolve controversies where state policies differ . . . If full faith and credit is not given in that situation, the Clause and the statute fail where their need is the greatest." *Morris v. Jones*, 329 U.S. at 553. The Full Faith and Credit Clause is part of the structural commitment in the Constitution to the equality of the States, *see, e.g.*, U.S. CONST., Art I, § 3, cl. 1 (equal number of senators); Art. IV, § 2, cl. 1 (Privileges and Immunities Clause), and guarantees the equal authority for each State's judgments. As Justice Jackson stated, "the policy ultimately to be served in application of the clause is the federal policy of a 'more perfect union' of our legal systems. No local interest and no balance of local interests

can rise above this consideration." Robert H. Jackson, *Full Faith and Credit — The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 27 (1945).

Moreover, the constitutional requirement is "Full Faith and Credit" — not some credit, partial credit, reasonable credit, credit in cases where States do not disagree over public policy, or credit where the second State would have reached the same result anyway. Indeed, the Constitutional Convention considered the less demanding formulation that "full faith and credit *ought to be given*" to sister States' judgments, but the permissive term "ought" was stricken upon the suggestion of James Madison and replaced by the mandatory language of "shall." 2 FARRAND, *supra*, at 489. Congress reinforced this point in the implementing legislation: it requires other courts to give to Michigan judgments "the *same* full faith and credit" that Michigan would give to its own judgments.

Even weaker is the argument that federal courts may declare a Michigan judgment offensive to federal policy. Such an exception would be an especially unwarranted intrusion into matters of state policy. *Cf. Erie R.R. Co. v. Tomkins*, 304 U.S. 64 (1938) ("[t]here is no federal general common law"). Indeed, if an exception based on federal policy existed, one would expect to find it in cases involving important federal questions — especially questions arising under the civil rights laws, where the original grant of federal jurisdiction has been said to have reflected mistrust of the state courts, *see Mitchum v. Foster*, 407 U.S. 225, 241-42 (1972), or under statutes protecting unique federal interests by granting exclusive jurisdiction to federal courts. But this Court repeatedly has rejected such an exception and held litigants bound by state court determinations, or state agency determinations reviewed by state courts, in such contexts. *See Migra v. Warren City School Dist. Board of Education*, 465 U.S. 75 (1984) (§ 1983); *Kremer v.*

Chemical Construction Corp., 456 U.S. 461 (1982) (Civil Rights Act of 1964); *Allen v. McCurry*, 449 U.S. 90, 98-99 (1980) (§ 1983); *Matsushita Elec., supra* (securities law); *Marrese, supra* (antitrust).

Although each of these federal statutes embodies important federal public policies, none was held to limit the operation of § 1738, which compels federal courts to give the same effect to judgments as would the rendering State. It would be quite incongruous to hold that § 1738 is implicitly overridden by the public policy interests that the Federal Rules of Evidence are asserted to embody, especially when those Rules leave privilege issues in diversity cases such as this one to state law.

If a second court could refuse to honor another state's judgment on "public policy" grounds, few judgments would be safe from relitigation.[4] Resourceful counsel could revive every argument that the parties made in the first case, advance those arguments in the second case, and cast the first court's rejection of those arguments as a rejection of the second State's "public policy" — a result that would not be consistent with the unifying policies underlying the Full Faith and Credit Clause.

Indeed, this case illustrates how "public policy" can be invoked to relitigate the factual determinations of the court that rendered the first judgment. There is no significant disagreement in the substantive legal principles or policies applied by the Michigan court and then later by the federal district court. The law of both jurisdictions recognizes the need for broad discovery and the protection of privileged

[4] Giving full faith and credit to *judgments* — as opposed to *statutes* — without regard to "public policies" also furthers the purpose of enhancing judicial economy by preventing relitigation of claims. A public policy exception in the choice of law context does not frustrate these goals.

information. The courts' only disagreement was whether, as a factual matter, Elwell's knowledge is so permeated with privileged sources that he cannot tell when he is violating GM's privileges and when he is not. The contrary conclusions reached of the federal district and the Michigan court do not involve a fundamental issue of policy.[5]

Similarly, Michigan courts do not question the policy that rights of third parties should be considered in fashioning injunctive relief. *See Hayes-Albion v. Kuberski*, 421 Mich. 170, 189-90 & n.11 (1984). Thus, Petitioners' position essentially would require this Court to assume that the Michigan court violated its duty to give due weight to the interests of third parties as required by Michigan law. Because most if not all States require courts in considering injunctive relief — including such relief granted by way of a consent decree — to consider the effect the injunction would have on the public interest or on third parties, *see* Restatement (Second) of Torts §§ 933, 936, 942 (1977), enforcing the full faith and credit obligation to honor the injunction here will not, as Petitioners suggest, cause an avalanche of collusive decrees designed to bury the unfavorable testimony of witnesses.[6]

[5] Although Petitioners identify a federal policy in favor of "the right to every man's evidence," Michigan recognizes the same policy, so that it cannot plausibly support a "public policy" disagreement between two jurisdictions. *See People v. Stanaway*, 446 Mich. 643, 662-663 (1994) ("the public has a right to everyone's evidence"). Similarly, just as Michigan recognizes the doctrines of attorney-client privilege and attorney work product, this Court has recognized that important policy interests promoted by these doctrines place a limitation on discovery. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Hickman v. Taylor*, 329 U.S. 495 (1947).

[6] Petitioners' suggestion that consent decrees somehow should be entitled to less full faith and credit would undermine the policy favoring settlements. *See, e.g., Marek v. Chesny*, 473 U.S. 1, 10-11 (1985); Fed.

In sum, this Court has correctly rejected the notion of a "public policy" exception to Full Faith and Credit for judgments, which is contrary to the constitutional mandate that a judgment that is conclusive under the laws of the rendering state must be conclusive in every other court.

3. The Full Faith And Credit Clause And Statute Require The Federal Court To Honor The Michigan Rule That Any Motion To Modify The Michigan Judgment Must Be Presented To In The Issuing Court

As discussed above, Michigan law provides that an injunction is enforceable even if it adversely affects (but does not directly "bind") nonparties, unless and until they secure modifications from the issuing court. Apart from their due process challenge, which is treated below, *see* Part II *infra*, Petitioners offer no reason why a court determining the full faith and credit owed the injunction should disregard this one particular effect under Michigan law among all others.

There is no such basis in the statute itself. It provides: "[E]very other court in the United States" is to give the injunction the "same full faith and credit" it has "by law or usage" in Michigan. 28 U.S.C. § 1738 As Justice Story declared, "when Congress gave the effect of a record to the judgment it gave all the collateral consequences." *Mills*, 11 U.S. (7 Cranch) at 484.

Moreover, the rule that an injunction is enforced unless and until an adversely affected nonparty seeks relief in the issuing court would not be a good candidate for an exception to full faith and credit. Courts of Appeals consistently have held that, where a federal court has issued a protective order limiting access to materials discovered in one case, other litigants seeking access to those materials should present

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R. Civ. P. 68. If a party were not assured that a settlement would be enforceable, then that party would be far less likely to settle.

their claims to the issuing court. *See, e.g., Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988) (" 'the procedurally correct course' for third party challenges to protective orders" is by intervening in the case in the issuing court); *United States v. GAF*, 596 F.2d 10, 16 (2d Cir. 1979); *Grove Fresh Distributers, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896-97 (7th Cir. 1994); *Empire Blue Cross & Blue Shield v. Janet Greeson's*, 62 F.3d 1217, 1219-20 (9th Cir. 1995); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990).

Because federal courts apply such a rule as a matter of comity, they necessarily must do so when determining the effect of a state court judgment, which is governed not by comity but by the far stronger full faith and credit obligation. *Cf.* 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 178 (1833) (Full Faith and Credit Clause intended more than the credit "which, by the comity of nations, is ordinarily conceded to all foreign judgments." Rather, it was intended to "give them a more conclusive efficiency, approaching to, if not identical with, that of domestic judgments.").

This Court's decision in *Ex parte Uppercu*, 239 U.S. 435 (1915), on which Petitioners rely, endorses exactly the approach as that required under Michigan law. In that case, as here, third parties affected by an order limiting disclosure of evidence sought relief from that order. This Court made clear that the proper course in such a circumstance is to seek relief from the issuing court. As Justice Holmes explained, "the orderly course is to obtain a remission of that command [sealing the evidence] *from the source from which it came.*" *Id.* at 440 (emphasis added). A requirement that modifications of a judgment be sought only in the issuing court is a common one that long has been respected by other courts called upon to determine the effect they should give such a judgment. For example, the law gov-

erning the relations among nations has long held that the courts of one country could not modify the judgments of another, even if modification was an available remedy in the issuing nation. As one English court explained in *Cottington's Case* (1678), cited in *Kennedy v. Cassillis,* 2 Swans. 313, 326, 36 Eng. Rep. 635, 640 (1818), "it is against the law of nations not to give credit to the judgments and sentences of foreign countries, *till they be reversed by the law, and according to the form,* of those countries wherein they were given." (emphasis added).

Therefore, there is nothing in the Full Faith and Credit Clause or statute that requires a federal court to give the injunction less effect than it would have in Michigan, where adversely affected third parties could prevent enforcement of the injunction only by seeking relief from the issuing court. Nor is there anything in the Due Process Clause that compels this result, as explained in the following section.

II.
ACCORDING FULL FAITH AND CREDIT TO THE MICHIGAN JUDGMENT AGAINST ELWELL DOES NOT VIOLATE PETITIONERS' RIGHT TO DUE PROCESS

In an effort to avoid the mandate of the Full Faith and Credit Clause, Petitioners advance the principle that they cannot be "bound" by a judgment in a case where they were not parties or otherwise represented. Pet. Brief at 12. This proposition — while undoubtedly true in the sense that a court cannot issue an order foreclosing a nonparty's claim or ordering a nonparty to pay money on a judgment — has no application here, because the Michigan injunction does not "bind" Petitioners in this way, but rather only incidentally affects their ability to *obtain evidence* for claims that they are able to pursue. The only burden that would be imposed on Petitioners by giving full faith and credit to the Michigan

injunction is that Petitioners must either forego the use of Elwell as a witness; or attempt to obtain his testimony by seeking a modification of the injunction in the issuing court. As shown below, this burden on Petitioners' ability to seek evidence, imposed by the full faith and credit obligation, does not amount to a due process violation.

A. Petitioners Are Note "Bound" By The Michigan Judgment Within The Meaning Of This Court's Precedents

Petitioners cite cases holding that the invocation of claim or issue preclusion against a nonparty deprives the nonparty of a cause of action, which is a "species of property" interest, *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 428 (1982), protected by the Due Process Clause. In each of these cases, nonparties to a judgment had been alleged to be "bound" by the judgment because the second court will not even consider their claim. *See Richards v. Jefferson County,* 116 S.Ct. 1761 (1996) (prior adjudication of constitutionality of county tax cannot bar subsequent challenges by nonparties); *Martin v. Wilks,* 490 U.S. 755 (1989) (consent decree cannot be used as defense to nonparties' claim that actions taken pursuant to the decree violates Title VII of the Civil Rights Act of 1964); *Hansberry v. Lee,* 311 U.S. 32 (1940) (no preclusive effect given to a finding in earlier suit which, if given effect, would foreclose a nonparty's defense); *Fall v. Eastin,* 215 U.S. 1 (1909) (divorce decree cannot preclude third party's claim of contractual entitlement to land).

The Michigan injunction here does "bind" Elwell and is enforceable against him as a matter of full faith and credit. But it does not similarly "bind" Petitioners, who remain free to litigate every element of their claims on the merits, including defect in design, causation in fact, proximate cause, etc.

What Petitioners have been denied — *unless and until* they obtain modification of the injunction in Michigan — is the opportunity to call a particular witness in their case. This incidental effect of the Michigan judgment does not deprive Petitioners of "the right to pursue a lawful claim of liability," despite their claim to that effect. Pet. Brief at 16. The question before this Court, therefore, is whether Petitioners have a protected property or liberty interest in Elwell's testimony, and if so, whether the procedures available to them, consistent with giving effect to the Michigan judgment, meet the minimum standards of due process.

B. A Litigant Has No Cognizable Due Process Interest In Particular Evidence

The Due Process Clause is implicated only where the government seeks to deprive a person of a protected interest in life, liberty, or property. *Board of Regents v. Roth,* 408 U.S. 564, 570 (1972). Petitioners' claimed right "to elicit and introduce relevant, nonprivileged testimony," Pet. Brief at 16, clearly is not a liberty interest guaranteed by the Constitution: although the Sixth Amendment guarantees certain rights to compulsory process of witnesses in *criminal* cases, the Seventh Amendment contains no comparable provision for civil cases in federal court.[7]

Nor do Petitioners have a protected property interest in Elwell's testimony. Applicable state law, which determines the existence of a property right, *see Roth,* 408 U.S. at 577, does not create any right that rises to the level of a property interest as defined by this Court. *Id.* Missouri courts have rejected the notion that evidentiary statutes create an enti-

[7] Petitioners have not argued that exclusion of Elwell's testimony imposes any stigma on them, *Wisconsin v. Constantineau,* 400 U.S. 433 (1971), or restrains their freedom to engage in any activity "essential to the orderly pursuit of happiness by free men." *Roth,* 408 U.S. at 572 (citation omitted).

tlement to particular evidence. *See Martin v. Schmalz,* 713 S.W.2d 22, 23-24 (Mo. Ct. App. 1986) (holding that statutory change denying access to previously available evidence "does not affect any existing substantive right" and can be applied retroactively despite the prohibition on enactment of any law "retrospective in its operation," 1945 Missouri Const. Art. 1, § 13); *see also State ex rel. Faith Hospital v. Enright,* 706 S.W.2d 852, 854 (Mo. 1986) (rules of evidence do not create substantive rights).

Indeed, Missouri law does not even recognize a cause of action for spoliation of evidence, *see Brown v. Hamid,* 856 S.W.2d 51, 56-57 (Mo. 1993), — which it surely would have to do if evidence were a protected property interest under Missouri law. *See generally Leis v. Flynt,* 439 U.S. 438, 443 (1979) (Due Process Clause not implicated unless there is "a deprivation . . . of some right previously held under state law"); *Memphis Light, Gas & Water Div. v. Craft,* 436 U.S. 1, 11 (1978) ("[t]he availability of local-law remedies [for damages] is evidence of the State's recognition of a protected interest").

Nor has this Court ever recognized a protected interest in the rules of evidence. On the contrary, the Court has held that "statutory rule[s] of evidence . . . do not customarily involve constitutional questions." *United States v. Augenblick,* 393 U.S. 348, 352 (1969). In *Augenblick,* the petitioner claimed that his due process rights were violated during his court martial by the denial of discovery of his tape recorded statements, to which he was entitled under the Jenck's Act, 18 U.S.C. § 3500. The Court held that a denial of discovery, even though it violated statutory requirements, could not be "elevated to a constitutional level" and deemed a violation of the Due Process Clause, unless the proceeding as a whole was rendered fundamentally unfair — a standard that this Court has employed in criminal cases. 393 U.S. at 356. *See also Arizona v. Youngblood,* 488 U.S. 51, 58

(1988) (holding that the Due Process Clause is not implicated where state officials in good faith unilaterally discard evidence that might have contributed to the defense); *California v. Trombetta*, 467 U.S. 479, 491-92 (1984) (O'Connor, J., concurring) ("Rules concerning preservation of evidence are generally matters of state, not federal constitutional law"). Although a State's creation of *adjudicatory procedures for redressing a grievance* may give rise to a protected interest, *see Logan* 455 U.S. at 431, this Court has never suggested that *evidentiary rules* create such an interest.[8] *Cf. Olim v. Wakinekona*, 461 U.S. 238, 250 (1983) (procedures for adjudicating rights do not in themselves create interests protected by the Due Process Clause: "Process is not an end in itself."). The only time that his Court has imbued evidentiary rules with constitutional significance is in the criminal context, where it is essential to ensure that "criminal defendants be afforded a meaningful opportunity to present a complete defense." *Trombetta*, 467 U.S. at 485.

The consequence of recognizing a property interest in evidence would be that the adequacy of procedures available in litigating every evidentiary motion would become a question of due process. This Court rejected this notion in *Augenblick* in the context of the defendant's argument that he should have been allowed to call the interrogating officer and examine him with respect to the whereabouts of the recorded statement; this Court explained that "questions of

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[8] This Court repeatedly has recognized and given effect to limitations on evidence without making any reference to due process concerns. *See e.g., Hunt v. Blackburn*, 128 U.S. 464 (1888) (attorney client privilege); *Hickman v. Taylor*, 392 U.S. 495 (1947) (attorney work product); *United States v. Reynolds*, 345 U.S. 1 (1953) (state secret privilege). Indeed, where a state secret privilege prevents disclosure and use of evidence, that evidence is disregarded, and the claim or defense will be *dismissed* unless there is sufficient nonprivileged evidence. *See e.g., Bareford v. General Dynamics Corp.*, 973 F.2d 1138, 1141 (5th Cir. 1992); *In re United States*, 872 F.2d 472, 476 (D.C. Cir. 1989).

that character do not rise to a constitutional level." 393 U.S. at 356. A contrary proposition, if accepted, would result in an unwarranted and intrusive federal oversight of state court procedures, not merely for their constitutional adequacy as a whole, but with respect to each evidentiary ruling.

Recognizing a property interest in evidence also would create an expansive new source of liability for state officials. For example, suppose that a state forensics laboratory, while investigating a murder, destroyed relevant and admissible evidence that could determine the identity of the perpetrator. The heirs of the deceased would have been deprived of evidence that otherwise would have been available to support a cause of action against the perpetrator for wrongful death. If the heirs were deemed to have a property interest in that evidence, the State would have committed a due process violation unless it provided the heirs with a post-deprivation remedy. *See Hudson v. Palmer*, 468 U.S. 517, 533 (1984) ("unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment *if a meaningful postdeprivation remedy for the loss is available*) (emphasis added). This effectively would mandate that the State of Missouri create a spoliation of evidence cause of action against state employees as a matter of federal constitutional law, even though it has specifically declined to recognize such a cause of action against private persons. Such a result would be inconsistent with the principle that state law governs the definition of property.

In sum, Petitioners' purported due process interest in evidence finds no support in Missouri law or in this Court's jurisprudence. Enforcing the terms of the Michigan injunction against Elwell, therefore, does not deprive Petitioners of an interest protected by the Due Process Clause.

C. Even If Petitioners Have A Due Process Interest In Elwell's Testimony, The Procedures Available To Petitioners Satisfy The Requirements Of Due Process

Even if this Court were to hold that Petitioners have a due process right in evidence, there still would be no basis for holding that the full faith and credit obligation to honor Michigan law as to the effect of the Michigan injunction, including the requirement that third parties seeking to modify the injunction do so in the issuing court, would deprive Petitioners of that interest without due process — even assuming that the due process command in this sense qualifies the full faith and credit obligation.

Due process is a flexible concept, the content of which "varies according to specific factual contexts." *Hanna v. Larche*, 363 U.S. 420, 442 (1960). In this case, the full faith and credit obligation that Petitioners seek any modification from the issuing court creates only a slight burden and does not violate the Due Process Clause. *Cf. Logan*, 455 U.S. at 437 (a "reasonable procedural or evidentiary rule" does not violate due process).

At most, application of the full faith and credit principle deprives Petitioners of their ability to obtain and use one witness's testimony. But Anglo-American jurisprudence is rife with limitations on access to and use of evidence that are designed to protect a countervailing public or private interest, including rules of privilege, rules protecting trade secrets, rules barring the use of parol evidence, and rules prohibiting revelation of state secrets. Application of any of these rules may have the practical effect of denying a party access to the only source of evidence by which that party may seek to prove a claim or a defense. Yet, the fact that the parol evidence rule may prevent a person from vindicating his interest in a contract, as modified by oral agreement, does not implicate due process concerns, nor does a rule prohibiting an employee from disclosing a trade secret of his

former employer. Likewise, the state-created laws of privilege that federal courts must enforce pursuant to Federal Rules of Evidence, Rule 501, never have been thought offensive to due process. *See infra* n. 8.

If full faith and credit is accorded to the injunction against Elwell, Petitioners still may resort to procedural remedies provided by Michigan law. As noted above *supra*, section I(A)(2), a third party adversely affected by a Michigan injunction may request that the issuing court modify the injunction, and that court has discretion to do so if "it is no longer equitable that the judgment should have prospective application," Mich. Ct. R. § 2.612(C), or if the court finds *"any other reason justifying relief." Id.* § 2.612(C) (emphasis added). Thus, Michigan law does not make changed circumstances between the parties a precondition to modification of an injunction. In addition, as noted above, an adversely affected third party intervenor may appeal a decision denying the motion to modify. Mich. Ct. R. § 7.203; *Michigan Bank-Midwest*, 165 Mich. App. at 642-43.

On the other hand, allowing the federal district court to determine this issue has no "probable value" in reducing "the risk of erroneous deprivation." *Mathews*, 424 U.S. at 335. The Michigan court is best suited to determine the applicability of its own laws of privilege and the appropriate means of protecting privileged information. It also is as capable as the federal court in reexamining the correctness of the factual premise of the injunction: that GM cannot sufficiently protect its privileged information by lodging specific objections during Elwell's testimony.

Allowing the federal court in Missouri in effect to ignore the Michigan injunction would encroach upon Michigan's legitimate interests in the orderly operation of the procedures that it has set forth for modifying a judgment of its courts, which requires that only the issuing court can modify

an injunction. Mich. Ct. R. § 2.613(B). This requirement embodies a policy choice made by Michigan, which is

> to preserve the dignity and stability of judicial action by preventing unhappy litigants from turning to other trial judges to have the judgment "reversed" and by preventing 'judge shopping.'

Huber, 160 Mich. App. at 573. The rule also reflects Michigan's judgment that, where modification of a judgment or an order is sought, "the original judge is best qualified to rule on the matter." *Id.* The only *Michigan courts* to have addressed whether a litigant should have access to Elwell's testimony without presenting that claim to the issuing court, have adhered to this rule and denied the requests. *See* Respondent's Appendix D & E.

Michigan's interest in "the dignity and stability of judicial action" is jeopardized by inconsistent orders from its own courts, a situation that Michigan appellate courts may review and reconcile. That interest is placed at a much greater peril if courts of other jurisdictions are allowed to "reverse" the issuing court. Given that Michigan has a legitimate interest in preventing "judge shopping," and has declared that Michigan judgments may not be reconsidered in any other court including its own courts, the principles of comity and full faith and credit preclude any claim of a constitutional entitlement to *inter-jurisdictional* forum shopping.

In short, a federal court has no warrant to disregard the procedures established by Michigan in order to decide what is essentially a question of Michigan privilege law. If the Michigan court abused its discretion — as a matter of Michigan privilege law — by adopting the particular form of relief for GM, that would be a matter for the Michigan courts to correct. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941); *Moore v. Sims*, 442 U.S. 415, 429-30 (1979). If the Michigan court correctly

applied Michigan's law of privilege and a constitutional claim is raised, the appellate courts of Michigan should be given an opportunity to correct any error. *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604-05 (1975) (state courts must be given an opportunity to fulfill their "function of providing a forum competent to vindicate any constitutional objections interposed against [state] policies").

As noted earlier, *Ex parte Uppercu* establishes that the proper course where a third party is adversely affected by a federal court order is to seek relief from that order from the issuing Court — not to challenge it collaterally in another court. Where, as here, the interests of comity and full faith and credit obligation are involved, *a fortiori*, requiring litigants to present their claim of entitlement to the issuing court is consistent with due process.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals for the Eighth Circuit should be affirmed.

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Respectfully submitted,

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